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NUCLEAR REGULATORY COMMISSION

Title: High-Level Waste Repository
Pre-Application Matters

Docket Number: PAPO-00; ASLBP No.: 04-829-01-PAPO

Location: Rockville, Maryland

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USNRC

March 7, 2007 (9:35am)

Date: Monday, March 5, 2007

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Work Order No.: NRC-1460

Pages 946-1051

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

- - - -

ATOMIC SAFETY AND LICENSING BOARD

PAPO CASE MANAGEMENT CONFERENCE

IN THE MATTER OF: ||

UNITED STATES DEPARTMENT || Docket No.

OF ENERGY || PAPO-00

(High-Level Waste Repository || ASLBP No.:

Pre-Application Matters) || 04-829-01-PAPO

Third Floor Hearing Room

Two White Flint North

11555 Rockville Pike

Rockville, MD 20852-2738

Monday, March 5, 2007

The above-entitled matter came on for hearing, pursuant to notice at 9:00 a.m.

BEFORE:

THE HONORABLE THOMAS S. MOORE, Chairman

THE HONORABLE ALEX S. KARLIN

THE HONORABLE ALAN S. ROSENTHAL

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 WASHINGTON, D.C. 20005-3701

1 APPEARANCES:

2 On Behalf of the US Department of Energy:

3 MICHAEL SHIBELSKI, ESQ.

4 Of: Hunton & Williams, LLP

5 951 East Byrd Street

6 Richmond, VA 23219

7 (804) 788-8200

8 On Behalf of the NRC:

9 JANICE MOORE, ESQ.

10 MARION ZOBLER, ESQ.

11 US Nuclear Regulatory Commission

12 Office of the General Counsel

13 Mail Stop - O-15 D21

14 Washington, DC 20555-0001

15 (301) 415-4073

16 On Behalf of the State of Nevada:

17 JOSEPH EGAN, ESQ.

18 CHARLES FITZPATRICK, ESQ.

19 MARTIN MALSCH, ESQ.

20 Of: Egan, Fitzpatrick, Malsch & Cynkar

21 The American Center at Tyson's Corner

22 8300 Boone Boulevard, Suite 340

23 Vienna, VA 22182

24 (703) 891-4050

25

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1 On Behalf of the National Electric Institute:

2 MICHAEL BAUSER, ESQ.

3 ELLEN GINSBERG, ESQ.

4 National Electric Institute

5 1776 I Street, NW

6 Washington, DC 20006-3708

7 On Behalf of Lincoln County:

8 BARRY S. NEUMAN, ESQ.

9 Of: Carter Ledyard & Milburn, LLP

10 2 Wall Street

11 New York, NY 10005

12 (212) 732-3200

13 On Behalf of Public Citizen:

14 MICHELLE BOYD

15 Legislative Director

16 Energy Program

17 Public Citizen

18 215 Pennsylvania Avenue, SE

19 Washington DC 20003

20 (202) 546-4996

21

22

23

24

25

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1 On Behalf of the Nevada Nuclear Waste Task

2 Force:

3 JUDY TREICHEL

4 Executive Director

5 Nevada Nuclear Waste Task Force, Inc.

6 Alamo Plaza

7 4550 West Oakley Boulevard, Suite 111

8 Las Vegas, NV 89102

9 (702) 248-1127

10 On Behalf of Churchill, Esmerelda, Eureka,

11 Lander and Mineral Counties:

12 LOREEN PITCHFORD

13 LSN Coordinator

14 gb4@charter.net

15 On Behalf of Eureka and Lander Counties:

16 DIANE CURRAN, ESQ.

17 Of: Harmon, Curran, Spielberg &

18 Eisenberg, LLP

19 1726 M Street, NW

20 Suite 600

21 Washington, DC 20036

22 (202) 328-3500

23

24

25

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P-R-O-C-E-E-D-I-N-G-S

9:00 a.m.

1
2
3 CHAIRMAN MOORE: On the record. Good
4 morning, ladies and gentlemen. I am Judge Thomas
5 Moore. On my left is Judge Alan Rosenthal and on my
6 right is Judge Alex Karlin. The Pre-license
7 Application Presiding Officer Board has convened
8 this case management conference this morning to
9 address the issue set forth in our order of February
10 9. The conference this morning is being recorded
11 and it's also being broadcast on the Agency's
12 broadband network.

13 We also have several participants this
14 morning participating by telephone and because of
15 that, we'll instigate some special procedures. We
16 will begin this morning with those participants in
17 the hearing room identifying themselves for the
18 record by stating their names, affiliation and
19 stating who they represent and then we will do the
20 same for those participating by telephone. We'll
21 start with those on my left.

22 MS. ZOBLER: Good morning. My name is
23 Marion Zobler. To my right is Janice Moore. We're
24 both at the Office of General Counsel and we
25 represent the NRC staff.

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1 MR. SHIBELSKI: Good morning. My name
2 is Michael Shibelski. I'm with Hunton & Williams
3 and I represent the Department of Energy.

4 MR. EGAN: Your Honor, this is Joe Egan
5 with Egan Fitzpatrick and Malsch. To my right is
6 Charles Fitzpatrick and to his right is Martin
7 Malsch. We all represent the State of Nevada.

8 MS. CURRAN: Good morning. My name is
9 Diane Curran. I'm with the firm of Harmon, Curran,
10 Spielberg & Eisenberg and I represent Eureka County
11 and Lander County, Nevada.

12 CHAIRMAN MOORE: Would those that are
13 participating by telephone identify yourself and
14 state whom you're representing please.

15 MS. TREICHEL: This is Judy Treichel
16 representing the Nevada Nuclear Waste Task Force
17 located in Nevada.

18 MS. PITCHFORD: This is Loreen
19 Pitchford. I'm a lawyer. I'm with Esmerelda,
20 Mineral and Churchill Counties in Nevada.

21 CHAIRMAN MOORE: Is there anyone else on
22 the telephone that is participating?

23 (No response.)

24 CHAIRMAN MOORE: As indicated in our
25 February 20 --

1 MR. BAUSER: Excuse me, Judge Moore.
2 Point of order. My name is Mike Bauser. I'm with
3 the Nuclear Energy Institute. I'm here with Ellen
4 Ginsberg this morning. Early last week or the week
5 before --

6 JUDGE ROSENTHAL: You have to come up to
7 a microphone.

8 MR. BAUSER: I am Mike Bauser with the
9 Nuclear Energy Institute and I'm here with Ellen
10 Ginsberg, General Counsel of the Nuclear Energy
11 Institute. Early last week or the week before, I
12 responded by email in response to the Board's
13 February 8th order indicating the NEI, the Nuclear
14 Energy Institute, desired to participate in this
15 meeting and that Ms. Ginsberg and I would be
16 representing the Nuclear Energy Institute.
17 Apparently either through some administrative mixup
18 or electronic malperformance, that email was not
19 received by the Board, but --

20 CHAIRMAN MOORE: Fine. Would you and
21 your colleagues wish to -- If you wish your
22 colleagues to join you, have a seat for those seats
23 that are available.

24 MR. BAUSER: Thank you very much.

25 CHAIRMAN MOORE: And then back up so

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1 that the court reporter gets it. Start over so that
2 the court reporter had your names, affiliations and
3 who you represent.

4 MR. BAUSER: Yes. Thank you. I am
5 Michael Bauser, B as in boy, A-U-S-E-R, Deputy
6 General Counsel of the Nuclear Energy Institute.

7 MS. GINSBERG: Ellen Ginsberg, General
8 Counsel, Nuclear Energy Institute.

9 CHAIRMAN MOORE: Thank you. As
10 indicated in our February 22 order, we will now mute
11 the telephone lines so that those participating by
12 telephone will be able to hear the proceeding but
13 will not be heard in the hearing room until we
14 reopen the lines. That will have the advantage of
15 giving them better reception so that they can hear
16 us and it will avoid having miscellaneous noise
17 interrupt the proceeding.

18 When the telephone lines are opened, we
19 would appreciate it if those that are participating
20 by telephone would first always identify yourself
21 before speaking. The clerk will now mute the those
22 telephone lines.

23 Before turning to the issue set forth in
24 our February 9th order, our review of the docket
25 indicates that there are several matters that need

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1 clarification and correction. First, pursuant to 10
2 CFR Section 2.314(b) and as set forth in our initial
3 July 9, 2004 pre-application phase order and then
4 repeated again in our order of February 22nd, all
5 persons and entities appearing before us must file a
6 notice of appearance meeting the requirements of
7 that said section.

8 Second, when counsel enters an
9 appearance by filing a notice as an attorney of
10 record on behalf of an individual or entity, we will
11 recognize that counsel as the sole representative of
12 that participant. If that participant chooses to
13 change its representation, counsel of record must
14 file a notice of withdrawal and then the new
15 representative must file a notice of appearance. If
16 counsel is entered in appearance on behalf of a
17 participant, the participant absent special or
18 unique circumstances may not appear on his or her
19 own behalf until counsel has withdrawn. For purpose
20 of today's case management conference, we will
21 permit participation by all those individuals who
22 have filed notices of appearance. After today,
23 however, all participants must adhere to these
24 requirements.

25 Third, there is a significant issue

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1 whether Section 2.314(b) permits lay representation
2 of a governmental entity. We need not decide that
3 issue today, but it is likely that issue will arise
4 with a concrete set of facts in the future and will
5 need to be decided. For purposes of today's
6 conference and until that issue is raised and
7 decided, those lay representatives who have filed
8 notices of appearance on behalf of governmental
9 entities will be permitted to participate at the
10 sufferance of the Board.

11 Fourth, all lay persons acting as
12 representative of any entity, governmental or
13 otherwise, shall file as a supplement to his or her
14 notice of appearance a signed statement from the
15 highest executive authority of the represented
16 entity authorizing its representation by the lay
17 person of record. Self-certification that an
18 organization or governmental entity has authorized
19 its representation by the individual will not
20 suffice.

21 We hope that's clear. We would have
22 thought it was clear without our needing to bring it
23 up, but are there any questions?

24 (No response.)

25 CHAIRMAN MOORE: The clerk will open the

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1 telephone lines. Do any of the telephone
2 participants have any questions?

3 (No response.)

4 MS. TREICHEL: No. I'm assuming -- This
5 is Judy Treichel. I'm assuming that as of a lay
6 representative of a non-governmental organization
7 then that you would need this supplemental filing
8 and I'll do that.

9 JUDGE KARLIN: Ms. Treichel, we have one
10 question. This is Alex Karlin. Nevada Nuclear
11 Waste Task Force, I believe, you are representing
12 them.

13 MS. TREICHEL: Yes.

14 JUDGE KARLIN: You also have a
15 certification from Brian Wolfson, attorney of
16 record, who filed over a year ago representing your
17 organization. Do you understand the implications of
18 what we just said vis-à-vis you and Mr. Wolfson both
19 filing a notice of appearance.

20 MS. TREICHEL: I don't know Mr. Wolfson.
21 Maybe it's a different organization.

22 JUDGE KARLIN: He appears to have filed
23 a notice of appearance on behalf of your
24 organization and he is an attorney of record. So he
25 will need to file a withdrawal or you will need to

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1 communicate with him to file a withdrawal. Thank
2 you.

3 MS. TREICHEL: Okay. That's fine. At
4 some other time, I'll get with someone to find out.

5 JUDGE KARLIN: Wolfman. I'm sorry.
6 It's Wolfman. It's Wolfman.

7 MS. BOYD: This is Michelle Boyd.

8 CHAIRMAN MOORE: Would you please
9 identify yourself?

10 MR. BAUSER: Michelle Boyd with Public
11 Citizen and I think I'm also supposed to be sitting
12 at this table.

13 CHAIRMAN MOORE: I still can't hear you.

14 MS. BOYD: Michelle Boyd with Public
15 Citizen. I apologize. I think I should also be
16 sitting at this table. I filed a notice of
17 appearance. Mr. Wolfman is our lawyer for Public
18 Citizen. He filed initially because we thought we
19 had to have legal representation in order to file
20 with the PAPO Board. But since then, it was under
21 the understanding that we did not have to have a
22 lawyer. So I'll make sure that he does file a
23 notice of withdrawal.

24 CHAIRMAN MOORE: Thank you.

25 JUDGE KARLIN: Thank you. It's probably

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1 a good idea for you to come forward. You have filed
2 a notice of appearance and you did send an email
3 indicating that you would be participating in this
4 conference. But I might suggest that Mr. Wolfman,
5 I'm sorry, I said Wolfson, but it's Mr. Wolfman
6 filed a notice of appearance on behalf of NIRS
7 Public Citizen and Nevada Nuclear Waste Task Force
8 and under what Judge Moore just said, when a lawyer
9 and a non-lawyer have both filed a notice of
10 appearance, the lawyer is the one who will speak and
11 participate.

12 So we'll need to have a withdrawal by
13 Mr. Wolfman if you are going to be representing, our
14 organization, is going to be represented by non-
15 attorneys. We encourage people to be represented by
16 attorneys, but you have the right, certain
17 organizations have a right, not to be and if that's
18 your choice fine. But please ask Mr. Wolfman to
19 file a notice of withdrawal.

20 MS. BOYD: Absolutely.

21 CHAIRMAN MOORE: Ms. Boyd, would you now
22 so that clerk and that there's no misunderstanding
23 state your name, affiliation and who you represent.

24 MS. BOYD: Michelle Boyd with Public
25 Citizen.

1 JUDGE KARLIN: And I would just for the
2 record reflect that I think it's very unwise for
3 your organization not to be represented by counsel.
4 But if you choose to do that, that is your legal
5 right.

6 CHAIRMAN MOORE: As the first order of
7 business, we had asked the Licensing Support Network
8 Administrator Dan Grazer to provide us with a brief
9 report on the recent history and current status of
10 the document processing activity with respect to the
11 public and non-public document collections indexed
12 on the LSN. Mr. Grazer, would you please proceed.

13 MR. GRAZER: Thank you. This morning
14 I'm reporting on the 15 organizations that have
15 loaded documents to the LSN. The organizations
16 include two Federal organizations, the Department of
17 Energy and the Nuclear Regulatory Commission. One
18 of the two DOE collections containing approximately
19 2,148,000 documents is currently not publicly
20 available. The other collection is available and
21 has been available since the initial loading process
22 for the DOE collection.

23 We have one state government collection,
24 the State of Nevada, nine Nevada counties,
25 Churchill, Clark, Esmerelda, Eureka, Lander,

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1 Lincoln, Mineral, Nye and White Pine. The Nye
2 County collection containing approximately 1,250
3 documents is currently not publicly available at
4 their request. We have one California county, Inyo
5 County, on Nevada city government, the City of Las
6 Vegas and finally, the Nuclear Energy Institute.

7 Two other organizations, the City of
8 Henderson and the City of North Las Vegas, have
9 requested and have been provided with briefings
10 about the technical aspects of adding document
11 collections, but they have not yet done so at this
12 time.

13 The LSN has just under 3,450,000 items
14 in the database. This includes a mixture of text
15 and/or image documents and a number of bibliographic
16 header-only documents.

17 The document-loading activities of the
18 participating organizations over the past year can
19 be characterized as orderly when controlled. I have
20 prepared three charts indicating some of the
21 cumulative counts arrayed over time to indicate just
22 how stable the document load process has been. I
23 did not include the cumulative for the State of
24 Nevada because they did have 3,372 documents loaded
25 all in one load process during November 2006. So

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1 that would have been a single datapoint for the
2 chart and probably would not have indicated very
3 much in the way of the steady nature of loading that
4 we've experienced.

5 The three charts that I did include, I
6 split them out into three separate charts primarily
7 because the y-axis scale is magnitudes different
8 between the Department of Energy collection, the
9 Nuclear Regulatory Commission's collection and the
10 other affected units of local government.

11 The first chart focuses on the largest
12 collection, the Department of Energy, and it
13 indicates that the relative volume of LSN holdings
14 has remained stable during the period of DOE
15 maintenance activities which included a number of
16 deletions following procedures previously
17 established by the PAPO Board. The second chart
18 indicates NRC load activity. The third chart
19 combines all the other participating organizations
20 with the exception of the State of Nevada.

21 Since January of 2006, there has been
22 only one month where the load activities exceeded
23 30,000 for the month. That was when the Department
24 of Energy loaded approximately 31,000 documents in
25 January of 2006. You may recall that the LSN is

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1 capable of indexing approximately 30,000 documents
2 per day depending on the volume of text pages
3 comprising such a batch and assuming no problems
4 that would cause the load process to hang up and not
5 successfully complete the indexing process.

6 For the past year, I would characterize
7 the technical processing activities to be routine.
8 Technical exchanges between LSN staff and the
9 participant organizations has been ongoing. A
10 number of the affected units of local government
11 have established collections and we have worked with
12 them to resolve occasional problems with document
13 text indexing. At this point in time, only one
14 document has proven to be un-indexable out of the
15 3.4 million documents and that document is an NRC
16 document for which we have posted the ADAMS
17 accession number on the LSN website and the full
18 text of that document is available via the NRC
19 public website in its full text.

20 One collection, Eureka County, had to be
21 rebuilt and reloaded. The same documents that were
22 originally placed on the collection were pulled off
23 in their entirety and loaded back on. Two
24 collections, DOE and NRC, have processed document
25 deletions in accordance with the procedures

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1 established by the PAPO Board and that essentially
2 covers the nature of activities that have been
3 ongoing for the past year.

4 CHAIRMAN MOORE: You mentioned the
5 header-only documents. Do you have a count on how
6 many are currently in the system?

7 MR. GRAZER: I don't have that count
8 with me. I can get that and provide it to you if
9 you would like that number.

10 CHAIRMAN MOORE: Do any of the
11 participants in the hearing room have any questions
12 for Mr. Grazer about the LSN collections?

13 MR. FITZPATRICK: Charles Fitzpatrick
14 for the State of Nevada. Just one clarification on
15 the chart, the first chart, the DOE cumulative. Am
16 I reading this correctly to indicate that since
17 August of 2005 to the present, during those 18
18 months approximately, the number has gone up very
19 slightly but essentially remains steady? That it
20 rose sharply up until August of 2005 and then has
21 gone up perhaps less than 100,000 documents since
22 then?

23 MR. GRAZER: Yes, I would say that's a
24 fair characterization.

25 MR. FITZPATRICK: Hypothetically, if the

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1 PAPO Board asked you to make the 2.5 million of the
2 3.5 million DOE documents that are not currently
3 publicly available asked you to make them publicly
4 available on the NRC's centralized LSN network or if
5 DOE asked you to do so, have they been processed?
6 So how long would it take you to do that?

7 MR. GRAZER: They have been processed.
8 They have been indexed. They have been loaded on
9 the LSN and it is just a matter of less than an hour
10 to get a communication to the contractor to open
11 that document collection up.

12 MR. FITZPATRICK: That's all I have.
13 Thank you.

14 CHAIRMAN MOORE: Mr. Shibelski.

15 MR. SHIBELSKI: That prompts a follow-up
16 question if I might. Mr. Grazer, did I understand
17 you to say correctly that the figures for the DOE
18 collection that are represented here are net figures
19 that take into account the additions and the
20 deletions over time.

21 MR. GRAZER: That's correct.

22 MR. SHIBELSKI: Thank you.

23 CHAIRMAN MOORE: The clerk will open the
24 telephone lines. Do any of the telephone
25 participants have any questions for Mr. Grazer?

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1 MS. TREICHEL: No.

2 MS. PITCHFORD: No.

3 CHAIRMAN MOORE: The clerk will close
4 the lines. Thank you, Mr. Grazer. We'll now turn
5 to the first issue identified in the order of
6 February 9th. Mr. Shibelski, can you tell us the
7 most likely date on which DOE will certify its LSN
8 document collection?

9 MR. SHIBELSKI: Yes sir. As the Board
10 knows, DOE has committed to certifying its LSN
11 collection no later than December 21, 2007.
12 Obviously, in preparing a schedule even with the
13 sort of specific date, we built in a certain window
14 to allow for contingencies. Under the current work
15 scope and what we see coming down the pike, it is
16 conceivable that we could certify our collection as
17 early as the beginning of the new fiscal year. So
18 that would be October 1, 2007.

19 CHAIRMAN MOORE: So the window is the
20 quarter, the first quarter of fiscal '08.

21 MR. SHIBELSKI: Yes sir.

22 JUDGE ROSENTHAL: But you're quite
23 confident that the certification will not take place
24 before that time.

25 MR. SHIBELSKI: Not material. September

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1 29th. September 30th.

2 JUDGE ROSENTHAL: I understand that.

3 MR. SHIBELSKI: But that's right, Your
4 Honor.

5 JUDGE ROSENTHAL: But on or about that
6 date would be the earliest that as matters now stand
7 DOE would expect the certification to take place.

8 MR. SHIBELSKI: Yes sir.

9 JUDGE KARLIN: Mr. Shibelski, welcome.
10 To everyone, we haven't seen each other for 15 or 16
11 months. So I think this is a useful thing to have a
12 case status conference and I have a question or two.

13 In your monthly report, it's troublesome
14 to us and I think perhaps you may understand. We
15 were looking for your best estimate as to when you
16 will certify and generally what you've been saying
17 is you will certify by a certain date which we take
18 to mean no later than or that's your no-later-than
19 date and therefore we're concerned to have a better
20 understanding of what you think is your best
21 estimate as to when you will certify. Do you have
22 that date for us?

23 MR. SHIBELSKI: Let me expand upon that
24 to give you some context of why up to this point we
25 had to cap things that way and where we are now. In

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1 2006, generally speaking, there were four major
2 activities with our collection that we were doing
3 processing behind the scenes. Obviously, we're
4 conducting our privilege reviews.

5 What we had done as this chart reflects
6 to expedite the process, we had front loaded all of
7 our documents, the balance of our documents. We
8 just put them out there so they get crawled and
9 spidered and that technical aspect could be done.
10 We did that while we were still undertaking the
11 manual privilege reviews and as the Board well
12 knows, we had a lot of documents claimed to be
13 privileged and we've worked all of those documents
14 down to a very modest numbers I might add.

15 Second, there had been a problem that
16 occurred and the Board may be generally aware of
17 this where certain documents that we had gotten
18 particularly from the NATO Nuclear Propulsion
19 Program where the electronic files had meta-dataed
20 the secure information in the meta-data that got
21 processed. So that initiated on our end a whole
22 need to do internal reviews and scrubbing on our
23 internal database to make sure that information was
24 crawled all. We had to work with the LSN
25 Administrator to make sure the meta-data wasn't on

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1 his system and so that had to be done before we
2 could be anywhere before we were moving access
3 control.

4 There was the whole new focus throughout
5 the Federal Government, obviously applied to the DOE
6 as well, with heightened protection to secure and
7 not release personal identifying information and
8 that set off a process where we were revamping and
9 searching the collection for privacy information.

10 And then also in 2006 through our own
11 internal assessments, we decided and undertook an
12 effort to improve our bibliographic headers, to beef
13 those up, provide much more information in them, to
14 not only meet but exceed, we think, the expectations
15 of the baselines requirements and that process
16 started in 2006. So we had all these activities
17 going on in 2006 combined with just frankly budget
18 issues and trying to map out when would money be
19 available to do all these activities and how they
20 would all get coordinated. And so in 2006, quite
21 fairly, Your Honor, we really couldn't say with any
22 more precision more than end of December of 2007.

23 As we move now into 2007, we have those
24 activities behind us that I've described, all the
25 header updates are occurring as we speak and we have

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1 really moved into a phase where the primary
2 activities we're doing now is the Office of General
3 Counsel is undertaking and it has been over time,
4 but again this final phase of compliance assurance
5 reviews, going through touching all the bases,
6 making sure every organization and department has
7 done its work.

8 Now I don't want to sound like Donald
9 Rumsfeld, but it's what I don't know is what
10 concerns me. I don't expect any problem. And so if
11 all goes smoothly, then you would expect that we
12 would be able to certify in the beginning of the
13 window that I described.

14 JUDGE ROSENTHAL: Wouldn't it have been
15 of some assistance to us if the status report that
16 you filed a few days ago, I think, March 1st or
17 thereabouts had indicated that there was a
18 possibility, a real possibility, that the collection
19 might be certified on or about October 1. As Judge
20 Karlin, I found very helpful the no-later-than
21 report that we've been getting month in and month
22 out.

23 I mean I understand that you want to
24 hold that open, that possibility, that it might
25 extend to the end of December. But if as you're

1 telling us today you knew on March 1 that there's
2 this window would commence on October 1 or
3 thereabouts, it seems to me that we were entitled to
4 have that told to us at that point rather than
5 simply this morning.

6 MR. SHIBELSKI: Right. I apologize for
7 that, Your Honor. But even now, I can't tell you
8 for certain that we will certify in October.

9 JUDGE ROSENTHAL: All we've asked for is
10 best estimates. Obviously, we recognize that it
11 might be impossible for you to state with certainty
12 that the collection will be filed on a certain date.
13 But again, where at least there is a reasonable
14 basis for the possibility that the collection would
15 be forthcoming as early as October 1 or thereabouts,
16 it seems to me again that we should have been told
17 that.

18 JUDGE KARLIN: May I? So back to my
19 question, are you suggesting that December 21 or
20 whatever it is of '07, is it currently your best
21 estimate as to when you will be certifying, when DOE
22 will be certifying, or is that more like the later
23 end of the spectrum?

24 MR. SHIBELSKI: I would say that's the
25 later end. I would characterize it now as saying

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1 there is a window.

2 JUDGE KARLIN: Yes.

3 MR. SHIBELSKI: Between approximately
4 possibly October 1, October through December.

5 JUDGE KARLIN: Okay. I think I
6 understand
7 what you're saying. I think it would be more
8 helpful if your monthly report could give us your
9 best estimate as opposed to your latest time frame.

10 Now I also want to hasten to suggest
11 that you're saying here today nor in your monthly
12 reports as I interpret it that you will necessarily
13 file on December 21, 2007. If it takes you longer,
14 if there are more work to be done, it will be '08 or
15 something later. Is this correct?

16 MR. SHIBELSKI: In theory, yes. We have
17 no reason to think it will take us beyond December.

18 JUDGE KARLIN: Right.

19 MR. SHIBELSKI: I would also say that
20 we're not going to sit and wait on our
21 certification. In other words, if it's ready,
22 everything complete October 1, we will certify
23 October 1. We're not going to sit and just wait
24 until December once we're ready.

25 JUDGE KARLIN: Okay. One point I want

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1 to suggest is when you certified, when DOE
2 certified, in June of '04 and we ended up finding
3 that that hadn't been complete and there were
4 certain privilege revenues that needed to be done
5 and that sort of thing that the state raised, one of
6 our concerns was at DOE there was an expectation
7 that was created politically or otherwise that you
8 must certify by June 30 of '04 and therefore you did
9 hell or high water and it ended up not being
10 sufficient. To my mind at any rate, it's much
11 better that you get your certification right than
12 you get it in by December 21 of '07 versus January
13 15 of '08. I think hopefully we all approach it
14 that way.

15 MR. SHIBELSKI: Absolutely. In the
16 schedule that we worked up with, worked up last
17 year, that came out of at December '07, was to allow
18 us ample margins to do a completely thorough job to
19 make sure to satisfaction that we complied the
20 regulations and the Board's expectations.
21 Absolutely.

22 JUDGE KARLIN: Now the other point I
23 would suggest is from the experience of '04. We saw
24 this is a substantial effort. DOE presumably will
25 have a certification plan in place that will entail

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1 certain milestones, triggers, such as a call memo.
2 I don't know what you're going to do exactly this
3 time, but you did a call memo before. You did what
4 we called a certification pyramid. There was a
5 process that obviously contemplated a several month
6 at least process before certification would occur.
7 You just don't wake up one morning and say, "I think
8 we'll certify today."

9 It could be helpful perhaps if you could
10 give us a feel for how long that process is.
11 There's a plan I presume in place. There's a
12 process. There are several months, perhaps, or more
13 that it's going to take and you might trigger that
14 certification plan at some point with a
15 contemplation that when it's done that it will take
16 six weeks or eight weeks or 15 weeks. Presuming you
17 have such a plan for certification.

18 MR. SHIBELSKI: Yes. We have plans and
19 procedures and they've been in place since 2004 and
20 earlier because the collection, the LSN collection,
21 process within DOE is an ongoing process. Every
22 month we are gathering documents from organizations
23 which given the size of the project, the number of
24 affected organizations, contractors, persons where
25 obviously we just can't say, "Let's start in summer

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1 of '07 to get everybody to turn their documents in."
2 We get monthly fees and we have systems set up to
3 gather documents. We have received the required
4 documents to be submitted to central offices for
5 collection and review and processing. So we have a
6 constant fee somewhere between, Judge Karlin, on
7 average 5,000 to 10,000 documents, new documents, a
8 month coming into our LSN collection from all these
9 sources.

10 JUDGE KARLIN: Right. But let me ask.
11 I understand there's an ongoing new document that
12 has to be added. But at some point, I guess someone
13 within DOE will shoot the starting gun off and say,
14 "Okay. We're going to certify in three months" and
15 boom, the process goes into place or the final run-
16 through and certification to make sure you do. And
17 if you could tell us when that starting gun is shot
18 off, then we would have a three month advanced, some
19 advanced notice, of when we're going to be receiving
20 this.

21 MR. SHIBELSKI: And just so you know,
22 throughout this whole time period, ever since summer
23 of '04, have issued periodic guidances, call them
24 what you will.

25 JUDGE KARLIN: Right.

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1 MR. SHIBELSKI: The most recent one, we
2 did one last fall. We asked all the organizations
3 to re-review files and make sure there were no
4 backlogs so we could make sure that nothing, no
5 historical groups of archived documents, we have to
6 clear the decks from. So in this year, we were just
7 dealing with new documents.

8 Yes, and there will come a time this
9 year where we will tell the organizations "All
10 right. Make sure everything," that we cleared the
11 decks of everything before '07 and make sure you're
12 telling us we have everything in '07 up to this
13 point.

14 JUDGE KARLIN: If you're just dealing
15 with new documents now, why don't you just certify
16 now because even after you certify there will be
17 updates that you have to do monthly for new
18 documents. It sounds like you're ready to certify
19 now and you just have a continuing duty to
20 supplement.

21 MR. SHIBELSKI: No. What we asked for
22 was to make sure there are not backlogs. There are
23 some issues that we're working off and we have some
24 backlogs from 2006 that we're still reviewing and
25 things like that.

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1 JUDGE KARLIN: Okay.

2 JUDGE ROSENTHAL: Do you have any window
3 with respect to the filing of the application
4 because you don't obviously have to wait six months
5 after certifying to file the application? The six
6 months just relates to the docketing of the
7 application as I understand it. So I just was
8 wondering whether just as you have apparently a
9 window for the certification, there might be a
10 window with respect to the application itself.

11 MR. SHIBELSKI: In theory, yes, Your
12 Honor. Obviously as soon as the license application
13 is ready, it will be filed. Again, it's not going
14 to be one of the situations where once it's ready
15 DOE is just going to sit on it and wait until June
16 30th.

17 Now how much in advance of June 30 of
18 2008 it might be ready? We've discussed this a
19 great deal with DOE over the past few weeks and we
20 just can't say. Obviously it's going to be in 2008.
21 It's not going to be in 2007.

22 JUDGE ROSENTHAL: All right. But all
23 that I would ask is that if at some point a window
24 is possible that that window be disclosed in your
25 status report rather than simply again saying no

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1 later than or by June 30, 2008.

2 MR. SHIBELSKI: Yes sir. And as we get
3 closer to that, that becomes more feasible.

4 CHAIRMAN MOORE: Is there any reason,
5 Mr. Shibelski, why DOE can't give us 180 days notice
6 both on certification and license application filing
7 or some other date? Certainly, you must be able to
8 look that far downstream.

9 MR. SHIBELSKI: Yes. Take the LSN
10 certification as an example. Here we are in March
11 talking about the possibility of certifying as early
12 as approximately October 1 which is sort of six
13 months from now, March to October. Really we're
14 talking about six months out, we have three month
15 window. When we're four months out, I suspect the
16 window, we'll have a smaller window. So I think
17 maybe that's the way I would approach it, Your
18 Honor. Every month that goes we'll be able to give
19 you a better estimate of where LSN takes you from
20 that window.

21 CHAIRMAN MOORE: Just let me so that you
22 understand that we are somewhat in the position of
23 Howdy-Dowdy and you're pulling the strings because
24 we have to react to you. But this might come as a
25 total shock to DOE, but they're not the only agency

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1 that has budget concerns and resource constraints.
2 And I don't know if you've been reading the
3 newspaper, but this agency and thus this panel will
4 be facing a veritable flood-tide of new license
5 applications, all of which take resources.

6 So this is not just idle talk on our
7 part. If we are to do any planning and it may be
8 planning that is merely rearranging the deck chair
9 on the Titanic, I don't know. But if we are to
10 prepare those lifeboats, we need as much advanced
11 notice as possible and I suspect that each and every
12 one of the parties or potential parties in this
13 proceeding for its own reasons and planning purposes
14 needs that kind of notice.

15 Because DOE is under a statutory
16 obligation to have done this that is now years past,
17 it seems to me that at a bare minimum DOE could
18 strive to be fully cooperative in giving another
19 Federal agency some cooperation in giving us as much
20 notice as possible. I'm speaking solely for myself,
21 but it's going to be most difficult for us with the
22 resource constraints that are on this panel to be
23 able to juggle everything that's coming and I
24 suspect the same is true for the General Counsel's
25 office and for the other constituent parts of the

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1 NRC.

2 So this is not idle talk. This is why
3 we need to know if we are to try to fulfill our
4 obligations.

5 MR. SHIBELSKI: Judge Moore, I
6 understand completely and believe me, we've had
7 those discussions internally at DOE. There are
8 representatives of DOE here in the audience and I'm
9 sure they hear you and take very seriously what
10 you're saying. I can commit to you that we are
11 certifying at first quarter of fiscal year 2008.

12 Another thing I'd like to relate to the
13 Board because this will get a further indication of
14 our ability where we'll come in on that window is
15 that it's DOE's goal to have the access control
16 removed on the second half of its collection within
17 the next 60 days. It's in the final process of
18 cleaning up that second collection as a result of
19 the work that we have been doing.

20 When we remove the access control as we
21 said within the next 60 days, that will be a very
22 good indication to the Board that, yes, we are on
23 track to be ready to certify in the beginning part
24 of that that window and we'll obviously keep the
25 Board apprised each month as we go forward.

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1 CHAIRMAN MOORE: But rather than us
2 reading tea leaves and signals and head fakes and
3 feints, just put it in the monthly report.

4 MR. SHIBELSKI: Yes sir.

5 CHAIRMAN MOORE: So when I get the April
6 1st report instead of being April Fools' Day, it
7 will merely say that DOE's best estimate is as of
8 this date that we will be certifying X to Y or even
9 better yet on Z date. That would be most helpful.

10 And no one is -- There's no punishment
11 attached if you don't make it, if DOE hasn't met
12 what Congress said that the Secretary shall file the
13 application 90 days after the President's site
14 certification. There's very little that any of us
15 can do to get DOE off the dime. So you need not be
16 concerned in that regard.

17 But going back to if 180 days is
18 impossible, we would appreciate just as much notice
19 because a great number of things flow from that.

20 MR. SHIBELSKI: Absolutely.

21 CHAIRMAN MOORE: You mentioned that you
22 had a "modest number" and that was your terminology
23 of privileged documents. Do you at this point have
24 a count or a rough count of how many privileged
25 documents DOE has in its collection?

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1 MR. SHIBELSKI: Yes sir. My numbers are
2 as of March 1st and out of a total document
3 collection of approximately 3.4 million documents,
4 right now, still in play we have approximately 6,800
5 that are subject to a primary privilege, 340 for one
6 or more of the security privileges, approximately
7 1,500 on the archaeological privilege, a little over
8 2,000 on privacy, 350 on business proprietary and
9 another approximately 350 on employees' concerns
10 filed documents. And then on the copyright
11 privilege, we have about 2,000 documents in the
12 collection with copyright, but then there's another
13 group that would ordinarily be excludable because
14 they are readily available publications, I expect,
15 and we have headers for them. But we have headers
16 for them and they're like 15,000, I think,
17 publications and things.

18 JUDGE KARLIN: But those are not covered
19 by -- wouldn't be covering those with copyright.

20 MR. SHIBELSKI: With a copyright. So I
21 think someone would have to ask us for a copy of
22 them and we would provide them that way. But in
23 terms of the primary privilege, we're talking in the
24 neighborhood of 6,800 documents.

25 JUDGE KARLIN: And may I ask what you

1 were speaking earlier, Mr. Shibelski about, within
2 the next 60 days you're suggesting that you would
3 have the access control removed on the second phase
4 or tranche of your documents or something like this.

5 MR. SHIBELSKI: Yes sir.

6 JUDGE KARLIN: Are you saying that at
7 that point you would instruct Mr. Grazer to release
8 them to the public? Is that what you're saying?

9 MR. SHIBELSKI: Yes.

10 JUDGE KARLIN: Okay. And how many
11 documents would that cover in the collection?

12 MR. SHIBELSKI: That would make publicly
13 available in the two collections combined certainly
14 something in excess of three million documents,
15 close to 3.3 million documents constituting some
16 upwards of 30 million pages of text.

17 JUDGE KARLIN: Okay. 3.3 million
18 approximately and 30 million pages or so.

19 MR. SHIBELSKI: Yes sir.

20 JUDGE KARLIN: And you're thinking your
21 plan is, you're not committed, that within about the
22 next 60 days you're expecting to authorize Mr.
23 Grazer to release those and make them public.

24 MR. SHIBELSKI: Yes sir.

25 CHAIRMAN MOORE: Thank you, Mr.

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1 Shibelski. Just a note to jog everyone's memory
2 that the window for DOE certification then triggers
3 all the other certification obligations of other
4 potential parties and participants. So you would be
5 well advised to get your own collections in order
6 and work with Mr. Grazer so that when DOE does
7 certify that clock will begin to run on (1) the
8 staff and then thereafter (2) all other potential
9 parties. So you should keep your eye on that clock.

10 JUDGE KARLIN: If I may, just to
11 underline that, I would agree that when and if DOE
12 certifies its document collection, obviously this
13 triggers the obligation of others to certify. As we
14 have said in prior orders, if someone were to
15 challenge DOE's certification this time, that does
16 not stay or hold in abeyance anyone's duty to
17 certify. So the duty to certify will continue even
18 if someone challenges DOE's certification. So keep
19 that in mind.

20 The other part of it is about a year and
21 a half ago we were discussing in this room whether
22 or not this Board should try to impose some record
23 retention responsibilities on the parties so that
24 documents that are being generated now, emails,
25 electronic documents by the various parties, might

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1 need to be retained in anticipation of
2 certification. There is a regulation on sub-part J
3 that deals, in some substance, with that. We
4 declined to issue an order regarding record
5 retention, but we did alert the parties that they
6 need to be concerned about that now and not wait
7 until 60 days after DOE certifies to suddenly think
8 "Oh, we need to retain documents."

9 We might also suggest to the parties
10 that they might want to look at the new Federal
11 Rules of Civil Procedure. This is just coming from
12 me at this point, but in December of '06, the
13 Federal Rules were amended to deal with
14 electronically stored information and what
15 constitutes reasonably accessible information and
16 what doesn't and how the rules apply. Now those
17 rules strictly speaking don't apply to proceedings
18 before the ASLBP, but I found them to be a very
19 useful and thoughtful analysis of new Federal Rules
20 of Civil Procedure dealing with electronically
21 stored information.

22 But I would suggest you consult with
23 your counsel and prepare to certify your document
24 collection. Because if you fail to substantially
25 comply with that, you cannot be a party in the

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1 proceeding that occurs after the application is
2 docketed.

3 MS. ZOBLER: Excuse me, Your Honor. I
4 would just like to clarify with respect to the NRC
5 staff certification. The staff did certify soon
6 after DOE and we don't intend to re-certify after
7 DOE comes in again.

8 JUDGE KARLIN: Right. We understand and
9 we have that on the agenda as to when there's a duty
10 to supplement all certifications. It's a continuing
11 one and at your instance, I think we suspended that,
12 the question of when do we get that back because
13 there will need to be recertification monthly. And
14 other parties have certified as well. Some other
15 parties I think have certified.

16 A couple of points. When you certify,
17 you have to name an administrator who's going to be
18 in charge, an official in charge of your license
19 documents and a couple people haven't done that. In
20 addition, when you certify, you need to put down the
21 principal point of contact for purposes of discovery
22 matters and as far as I can tell, nobody has done
23 that yet. So this is another reason why you might
24 want to have your counsel take a look at some of
25 these things because within the various orders we've

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1 issued, there are some requirements that people
2 don't seem to be following. And so take a look at
3 that. I encourage you.

4 CHAIRMAN MOORE: Let's move on to the
5 second matter set forth in the February 9th order
6 dealing with the schedule in the second case
7 management order for preparation of privilege logs
8 and redacted versions of documents. Since the
9 lion's share of that material is DOE material, Mr.
10 Shibelski, in light of the many months that have
11 passed from the time we set those schedules, is
12 there any reason that DOE cannot have its privilege
13 logs completed and documents redacted and available
14 on the LSN at the time you certify your document
15 collection?

16 MR. SHIBELSKI: We will have to re-
17 certify the privilege log entries as appropriate
18 and the redactions as appropriate for the numbers I
19 was just giving you. Those documents will be done.
20 Those privilege logs entries will be done. Those
21 redactions will be done.

22 Here's the situation we face though. As
23 we move up to the certification date, however,
24 whether it's the one month before or two month
25 before or three months before our cutoff date, there

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1 will be some presumably or potentially some number
2 of privilege documents in that tail end. I don't
3 know how many of them there will be. Based on our
4 averages we're looking at here, it ought to be
5 pretty small.

6 We obviously have to have some -- We
7 would like to have some reasonable window of time
8 after our certification in order to complete the
9 privilege log redactions for that tail end that
10 comes in.

11 CHAIRMAN MOORE: And you also
12 presumably, you as well as everyone else, will have
13 the same problem with their monthly supplementation.

14 MR. SHIBELSKI: Every month we're going
15 to have that same rolling situations.

16 CHAIRMAN MOORE: Can you suggest to us
17 today what might be a reasonable time frame for (1)
18 your tail-end problem and (2) the monthly
19 certification redaction privilege log potential
20 problem?

21 MR. SHIBELSKI: The way the case
22 management order works now in any event is that when
23 you certify you produce at that time every privilege
24 log entry for the primary privileges and redactions
25 that you have done. And then you update them on a

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1 weekly basis thereafter.

2 Now speaking for DOE, I can't speak for
3 anybody else, we have set up electronic review
4 queues systems so that when a document comes through
5 and it is flagged with privacy privilege, it has to
6 be redacted. It goes into electronic queue. We
7 have people who then look at it, do the appropriate
8 redaction. It gets reviewed and blessed basically
9 by a FOIA officer and then it gets produced on the
10 LSN.

11 So there's automated, I'll say, process
12 that we've set up and the documents go through this.
13 When we get to that tail-end process, Judge Moore,
14 and we'll work off the backlog, there's not going to
15 be a big queue of redactions to be done. So we're
16 going to have a constant feeding all these months,
17 rolling basis of have new documents coming in. They
18 get redacted and then they go out and do these
19 weekly updates. So even though there's a current
20 case management order given that we'll have no
21 historical backlog, we're going to be very fairly
22 prompt in putting our redactions.

23 My experience tells me that the more
24 likely documents you're going to run into potential
25 problems with are security redaction documents,

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1 although I think that really is contemplated in a
2 separate order. That's pending on dealing with
3 those and some of the archaeological privilege
4 documents because they're usually larger documents,
5 these reports. You have to have a specialist who
6 reviews them.

7 So I say all this in context of saying
8 we think as a practical matter that when we certify
9 since we have worked off our historical backlog we
10 will be staying fairly prompt in doing these
11 monthly, the rolling monthly, redaction process.
12 Now whether it takes us seven days, 14 days, to do a
13 particular redaction, I don't know and I would hope
14 that we don't have to be hamstrung now by an
15 artificial deadline because all that will mean that
16 if we don't meet it for a particular document we
17 have a file a motion for relief as opposed to saying
18 let's take a wait and see. I think hopefully you've
19 seen by the numbers that we're dealing with now we
20 have dramatically reduced our privileged documents.

21 We are not going to be in a situation in
22 the tail-end process where we have thousands of
23 privileged documents we have to work off. So I
24 hopes it's in the context we can just live with the
25 current order.

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1 CHAIRMAN MOORE: In the second case
2 management order on page 12 and that would probably
3 be 3(c), we set forth a full rolling schedule from
4 starting with the date you certified how we do that.
5 Now you've worked off essentially that. So we can
6 amend the second case management order to do away
7 with that schedule.

8 MR. SHIBELSKI: This is the schedule for
9 the primary privilege log?

10 CHAIRMAN MOORE: Yes, I'm starting with
11 privilege logs and then there's a similar schedule
12 for redaction.

13 MR. SHIBELSKI: Although, Your Honor, I
14 mean this schedule applies not only to what we would
15 call a historical backlog of privileged documents,
16 the ones to date, but even for the tail-end
17 privileged documents.

18 JUDGE KARLIN: No, I think the schedule
19 that Judge Moore is referring to and we're looking
20 at here basically says within 45 days of your
21 certification, your initial certification, you will
22 submit privilege logs for all the primary privilege
23 documents 45 days and we have this footnote and
24 we've developed the 45 days because at that point we
25 thought you would be certifying pretty soon.

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1 What I hear you saying is that with
2 regard to all the backlog you're basically ready to
3 give the privilege logs for those at the get-go, in
4 the first day or the first week or whatever. But
5 for any newly or after-created documents, and I
6 would focus on after-created documents as opposed to
7 after-collected documents, but in any event, for
8 later supplementation, you would do that on an
9 ongoing basis.

10 And I think that would work fine and it
11 would be helpful. I'm just speaking for myself. I
12 note the supplementation is on a monthly basis, not
13 a weekly. So the DOE and every other entity once
14 they initially certify and provide the privilege
15 logs, then once a month need to supplement and
16 provide the supplementary privilege logs.

17 MR. SHIBELSKI: Actually, Your Honor, we
18 had read it like on the privilege logs under (d)2
19 every seven days you update your privilege log.

20 CHAIRMAN MOORE: I may be mistaken.
21 It's been awhile. We're all a little rusty. (d),
22 let's see here (d). No, the way I looked at that
23 that's for others, non-DOE.

24 MR. SHIBELSKI: I'm sorry.

25 CHAIRMAN MOORE: That's for the non-DOE.

1 I mean DOE is the first to kick this ball game off
2 and so we've given you a 45 day schedule. Now that
3 it's been two years we figure you don't really need
4 the 45 days. Everyone else gets seven days given
5 that they will have you certify and then 90 days
6 later, they have to certify. So they have 90 days
7 of advanced notice after you've certified.

8 MR. SHIBELSKI: And their collections --

9 CHAIRMAN MOORE: Are smaller.

10 MR. SHIBELSKI: -- are noticeably
11 smaller.

12 CHAIRMAN MOORE: So what my question
13 went to is, and maybe this goes to Judge Karlin's,
14 the differentiation he just made between after-
15 collected and after-created documents. One would
16 hope that in your system there are few, if any, of
17 the after-collected documents that would fall under
18 that rough definition but there will be lots of
19 subsequently-created documents and some window right
20 up to when you certify. And we all recognize that.

21 What I was asking you specifically was
22 since if you pick an artificial data on which you
23 certify, at that point in time, you will have for
24 your various categories of privileged documents the
25 privilege logs already completed. And so those are

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1 ready to be, the logs are ready to be, published at
2 that point.

3 What do you suggest we do, if anything,
4 for this category of your catch-up? There's going
5 to be this period of time of a week, two weeks, a
6 month, before you certify when obviously you may not
7 be able to get the privilege logs done for documents
8 that are being created at that last moment.

9 MR. SHIBELSKI: Right.

10 CHAIRMAN MOORE: What schedule do you
11 wish to keep for those?

12 MR. SHIBELSKI: I wish to keep the
13 schedule that we have in the second case management
14 order. In the big scheme of things, that's a pretty
15 tight schedule, but in any event, it requires us to
16 update our logs every seven days and we're not --

17 CHAIRMAN MOORE: No, we're on different
18 wave lengths.

19 MR. SHIBELSKI: I'm sorry. I'm not
20 following then.

21 CHAIRMAN MOORE: Always glad to have
22 some translate.

23 JUDGE KARLIN: Perhaps I could, maybe,
24 take another shot at it. As I interpret the second
25 case management order, all parties must -- Once

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1 they certify their collection, they have seven days
2 within which to submit their privilege logs. DOE
3 has an exception because you were the first to
4 certify and we thought you have a huge collection
5 and this was two years ago when we thought
6 certification was imminent and so DOE had a special
7 rule that basically had a cascade, but ultimately,
8 45 days within to which to put your privilege logs
9 forward. We think 45 days is much overly generous
10 now and probably should be reduced to simply seven
11 days, for example, just like everybody else because
12 you are ready, willing and able to submit your
13 privilege logs now.

14 With regard to updates, you and everyone
15 else is subject to the supplementation rule at the
16 end of the order which says once per month. And so
17 you have a month to supplement your privilege logs,
18 supplement your document production and supplement
19 your privilege logs which would be simultaneous.

20 Now there might be some small delay of a
21 week or two or three that you would say these are
22 after-created documents and we haven't captured
23 them. We dealt with the dichotomy in our decision
24 of August 31, 2004. So I think we recognize that
25 there's that problem. But what we're suggesting is

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1 for the privilege logs, for the redactions --

2 CHAIRMAN MOORE: Just privilege logs.

3 JUDGE KARLIN: Well -- that the time
4 frames for the initial can be shortened drastically
5 because you've had all this time to get it done and
6 you're basically done with it as far as I can tell
7 you're saying.

8 MR. SHIBELSKI: We will be when we
9 certify.

10 JUDGE KARLIN: Yes, when you certify.

11 MR. EGAN: Your Honor, this is Joe Egan.
12 Can I just ask one question in relation to that? Is
13 there any reason to have a seven day delay at this
14 point because it seems to me that we've all had
15 enough time and including DOE if they have this
16 window of several months where there's no need for a
17 seven day delay to produce your major privilege log?

18 CHAIRMAN MOORE: That was one of the
19 questions we were going to get to was do we need to
20 shorten the seven-day for everyone else. But one
21 problem at a time, Mr. Egan.

22 MR. EGAN: Okay.

23 CHAIRMAN MOORE: Let's see if we can get
24 DOE straightened out for privilege logs. Then we're
25 going to have to go to redacted documents because

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1 the schedule in the second case management order for
2 redacted documents was even more generous by a
3 factor of two than that for privilege logs.

4 So if I understand what you're saying,
5 Mr. Shibelski, at the time DOE certifies its
6 collection, it will have, with the exception of some
7 documents at the tail-end, all its privilege logs
8 ready to publish.

9 MR. SHIBELSKI: Yes.

10 CHAIRMAN MOORE: Then, perhaps it would
11 be prudent that we just need a general rule because
12 of the size of your collection and the size of the
13 organization that's constantly feeding documents
14 into you a provision that deals with that catch-up
15 period.

16 MR. SHIBELSKI: Yes sir.

17 CHAIRMAN MOORE: What do you suggest is
18 reasonable for that for privilege logs recognizing
19 that there likely won't be very many primary
20 privilege documents in that collection of the catch-
21 up period?

22 MR. SHIBELSKI: Right. And if you
23 anticipate that the issue that we're going to have
24 to address with all the monthly updates as well on a
25 rolling basis and recognizing, I suppose, our hope

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1 that in a particular circumstance and if we
2 encountered a problem, one could a file motion for
3 relief if there was a problem, would it make sense
4 to have then just a rolling day catch-up then?

5 CHAIRMAN MOORE: So you're suggesting
6 that 30 days.

7 MR. SHIBELSKI: You have a
8 certification.

9 JUDGE KARLIN: I don't know that we need
10 to get to that bridge at this moment. You dealt
11 with this catch-up, rolling, after-created document
12 issue in our decision in '04 a little bit and we had
13 some trouble. But I think we expressed some --
14 tried to recognize it would be problem. That is to
15 say an organization that's creating 10,000 documents
16 per month we want an update once per month.

17 Is that update going to be instantaneous
18 as of that day? No, there's going to be some lag
19 time that we'll have to recognize there's after-
20 created documents. On the first of each month, you
21 will provide us with a supplement of another 10,000
22 documents, but that won't cover every document that
23 was created up until the first of the month. There
24 will be two weeks, three weeks. I don't know what
25 it will be, but it will be something reasonable.

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1 We have not articulated a specific time
2 frame that is a lag time. Maybe we should. Maybe
3 that's the issue here today. But I'm not sure
4 whether we need to.

5 For today, we may just simply say what I
6 hear you saying is that you can certify. When the
7 date you certify, you will be able to put all of the
8 privilege logs together right then and there for the
9 documents that are being certified that day and you
10 don't need 45 days within which to put those
11 privilege logs forward.

12 A month later when there are new
13 documents to be covered -- And I understand. You
14 will not have everything until the midnight of the
15 last day, but you will have a certification with
16 some maybe after-created document problem.

17 CHAIRMAN MOORE: But you'll pick that up
18 in the next 30 day supplementation.

19 JUDGE KARLIN: It will be picked up in
20 the next month. There's a lag time inevitable.

21 MR. SHIBELSKI: Yes, to that last point.
22 I just want to be clear that when we certify, let's
23 say October 1st, pick a date, the privilege logs I'm
24 sure -- Well, they will have been done and the
25 redaction is done for everything that's in our

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1 privilege queue as we sit here today.

2 Now the last month's worth of feed that
3 go into our October certification because we're
4 obviously collecting every month and rolling, what
5 I'm saying is that we may have a month or two, the
6 last month or two, of our collection, the privilege
7 log entries and redactions for those, if there are
8 any privileged documents, may not be ready when we
9 certify. We need a tolerance for that even with our
10 usual certifications.

11 CHAIRMAN MOORE: That's what I -- We're
12 down to that and we're on the same that.

13 MR. SHIBELSKI: All right.

14 JUDGE KARLIN: We talked about that in
15 our decision. You had April 15th before, April 15,
16 2004 versus June 30, 2004 and that's two and a half
17 months or something like that and we thought that
18 was a little bit too long and we also thought that
19 that included after-created documents and after-
20 collected documents. The after-collected documents
21 we took some umbrage at. The after-created we
22 understood that that was inevitable and we further
23 said that two and a half months was too much. I'm
24 not sure whether anybody's prepared today to say
25 exactly what is acceptable, but there's going to

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1 have to be some sort of a lag time.

2 MR. SHIBELSKI: There will have to be a
3 lag time, although, Your Honor, my recollection is
4 you didn't say it was too much. You said it was on
5 higher end.

6 JUDGE KARLIN: We didn't like it, but
7 yes.

8 MR. SHIBELSKI: But you didn't say it
9 was too much and I can tell you given the structure
10 and the size of the project that's really not
11 unrealistic.

12 JUDGE KARLIN: You're going to certify
13 whatever you certify and you'll take your changes
14 and hopefully it will be as short as possible.

15 CHAIRMAN MOORE: But just looking, it's
16 going to be a continuing system and recognizing that
17 there's going to be roughly a 30-day lag time
18 because you're going to certify every month and when
19 you're certifying, supplementing is the term we used
20 in the second case management order, you'll pick up
21 what it was from the previous time. Why is that not
22 the appropriate same window for your privilege logs?

23 MR. SHIBELSKI: In other words, rolling
24 in 30 days.

25 CHAIRMAN MOORE: It would be rolling for

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1 every 30 days and so you're essentially 30 days
2 behind every time. Is that reasonable?

3 MR. SHIBELSKI: As a benchmark?

4 CHAIRMAN MOORE: We'll look at that in
5 amending the second case management order. Before
6 we go to redactions, let's turn to the question of
7 all the other parties have a seven-day window in
8 which to prepare their privilege logs for their
9 primary privilege documents. Mr. Egan, you're
10 suggesting that we dispense with that seven-day
11 window and at the time of certification, the
12 privilege logs be produced.

13 MR. EGAN: Yes sir. We also think that
14 the regulations appear to contemplate that the 30-
15 day window takes care of this rolling problem. You
16 have to re-certify every 30 days anyway and so I
17 can't imagine that we would challenge DOE if they
18 missed it by a day, if it was 31 days we found a
19 document that they should have put in. I think
20 there's a rule of reason here and it seems to
21 revolve around 30 days.

22 CHAIRMAN MOORE: Does anyone else have a
23 comment?

24 MR. BAUSER: Yes, Mr. Chairman. Insofar
25 as privilege logs are concerned, I think it's

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1 reasonable to allow a seven day delay after
2 certification initially for submittal of those to
3 allow for something of a learning curve.

4 Subsequently, I think a simultaneous filing or
5 updating of privilege logs and supplementation is
6 reasonable.

7 CHAIRMAN MOORE: I don't know that seven
8 days is much of learning curve since we've now had
9 years essentially we issued the second case
10 management order on July 8, 2005. We're well past a
11 year and a half. That's a long learning curve right
12 there and it's all spelled out what needs to be
13 done. You will have to certify X number of days
14 after DOE certifies its collection.

15 All of these time frames were put in
16 with the contemplation that this was all going to
17 happen in the August/September 2005 time frame for
18 DOE and everyone else would have their collections
19 long since certified by now before Thanksgiving of
20 that year, I think, on the clock. So that's why
21 we're wondering. It might be easier just an across
22 the board when you certify have your privilege logs
23 done.

24 MR. BAUSER: Without taking issue with
25 anything you've said, I just hesitate to predict

1 perfection the first time simultaneously.

2 CHAIRMAN MOORE: Does anyone else have a
3 comment on an NEI's view?

4 MS. CURRAN: I think as long as we get
5 reasonable notice of when DOE is going to be
6 certifying that's the most important thing because
7 that then triggers our obligation to make sure our
8 collections are up to date.

9 CHAIRMAN MOORE: The clerk will open the
10 telephone lines. Do the telephone participants have
11 any comment on the seven-day period which they
12 currently have under the second case management
13 order in which to prepare their privilege logs and
14 we're talking about removing that seven-day window
15 and making the privilege logs for primary privilege
16 documents due at the same time of certification?

17 MS. TREICHEL: This is Judy Treichel and
18 that's not an issue for us. We're fine with
19 whatever is decided.

20 CHAIRMAN MOORE: Any other comments?

21 MS. PITCHFORD: This is Loreen Pitchford
22 and -- Hello?

23 CHAIRMAN MOORE: Yes.

24 MS. PITCHFORD: Sorry. And I really
25 don't think that there's a problem on our end

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1 either.

2 CHAIRMAN MOORE: Thank you. The clerk
3 will mute the line. We will then look to amend the
4 second case management order so that no one is
5 operating under it as it currently stands.

6 Now let's turn to redacted documents.
7 There is also a schedule that would be on page 16
8 under Section, I believe it's 4(b) for DOE's
9 schedule which gives them essentially 90 days from
10 certification in which they'd have to have all the
11 documents redacted. Is there any reason -- Do the
12 same factors apply to redacting documents that apply
13 to privilege logs and is there any reason why we
14 can't just treat them the same way now as we're
15 treating primary privilege logs?

16 MR. SHIBELSKI: The same factors apply
17 in the sense that our historical backlog will be
18 redacted. What we're really dealing with will be
19 what I call the tail-end.

20 CHAIRMAN MOORE: Right, and that's going
21 to be the rolling. It will be picked up in the
22 supplementation.

23 MR. SHIBELSKI: It will be for the
24 rolling. How many? We hope there will be very few
25 in the tail-end or in any given month that need to

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1 be redacted because hopefully at this point people
2 are putting privacy information in relevant emails
3 or whatever.

4 Will there be some that have to get
5 redacted in the tail-end on these rolling? I'm sure
6 there will be. Also I do note that we're
7 differentiating here the secondary privileges from
8 the security privileges.

9 CHAIRMAN MOORE: We have yet to wrestle
10 with those.

11 MR. SHIBELSKI: That's right because
12 those redactions, my experience tells me, take a lot
13 longer. So we need to have some tolerance obviously
14 for doing the updates on the redactions with the
15 tail-end. Ex ante what is reasonable --

16 CHAIRMAN MOORE: But that will be picked
17 up in the same kind of 30-day rolling
18 supplementation, will it not?

19 MR. SHIBELSKI: Yes. We will continue
20 working with it. I mean if the Board wants to do
21 the same sort of 30-day benchmark rolling with the
22 recognition that if we encounter a problem we'll
23 come back to the Board and ask for relief, we can do
24 that.

25 CHAIRMAN MOORE: Do any of the other

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1 participants in the hearing room have any comment on
2 that, treating the redactions for DOE's collection
3 the same way that we'll be dealing with privilege
4 logs?

5 MR. FITZPATRICK: No, Your Honor. That
6 seems fair to give them essentially 30 days until
7 the next monthly certification to clean up the
8 housework of the redactions just like the privilege
9 logs. But I'd like to ask a clarification with
10 respect to the other parties.

11 CHAIRMAN MOORE: That's the next
12 question. The case management order sets up the
13 same seven-day window for redactions for all the
14 other participants and for primary privilege logs,
15 we seem to be generally agreed with the exception of
16 NEI on the first wanting a learning curve that we
17 could dispense with that seven days and have those
18 essentially due at the time of each certification.
19 Any reason why we can't deal with redactions in the
20 same way?

21 MR. FITZPATRICK: I think there's no
22 reason you can't deal with redactions in the same
23 way for the other parties. But with respect to both
24 of them, there's a cautionary note and that is make
25 believe hypothetically that DOE's certification is

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1 October 1st. November, December, January 1st, State
2 of Nevada would be due and now we wouldn't have a
3 seven-day window after that for redactions or
4 privilege logs.

5 But there is still the issue of between,
6 say, December 25 and January 1, people are going to
7 be producing documents that either may need to be on
8 a log or they may need to be redacted and so we have
9 that problem similar to Mr. Shibelski in that on the
10 front end in that short time before certifying and
11 the monthly certifications we need to have an
12 understanding that we won't be held to the midnight
13 of the night before either.

14 CHAIRMAN MOORE: Why won't it be done
15 the same way? It will be picked up in that 30-day
16 supplementation window. Obviously, no one at the
17 point of certification can be certifying something
18 that happened the day before that they don't really
19 even know about in their organization.

20 MR. FITZPATRICK: Right, and it might be
21 a few days and so to avoid a proliferation of
22 reports coming in, you already have about 15 people
23 certifying, it may grow to 30 and there would be
24 these interim seven days, 14, all these different
25 things. Maybe if everyone certifies and then when

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1 they do their monthly certification, that
2 certification states "Here's the additional
3 documents, the number we've added this month. In
4 addition, we hereby confirm that our privilege log
5 and our redactions are up to date to the previous 30
6 days." In other words, if we add 10,000 this month
7 and we had 20,000 next month, next month we'd say,
8 "We're certifying 20,000 more and we're confirming
9 that the 10,000 we did this month, they've made the
10 privilege log or redaction if they needed to." So
11 each person would have to file one thing a month
12 that would cover all subjects.

13 JUDGE KARLIN: I'm not easy with -- I
14 feel a bit uneasy with what seems to be the
15 implication that there is an automatic sort of 30-
16 day window that everyone is going to claim or get
17 here. That is to say, let's say, DOE certifies on
18 October 1st and says, "We're now giving you all the
19 documents we have with the exception of some after
20 recently-created documents we haven't capture yet in
21 our system."

22 Now what is the look-back? How far back
23 can they miss? The state comes in here and says,
24 "Oh, it's two and a half months." That's too much.
25 We move to strike this certification. What are we

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1 going to do then?

2 I'm not sure whether we're creating a
3 rule here that we all agree to that says when DOE
4 initially certifies they don't have to worry about
5 the last 30 days of documents they created and they
6 don't have to worry about privilege logs for the
7 last 30 days and they don't have to worry about
8 redactions for the last 30 days or is that two and a
9 half months am I hearing?

10 And let's say, on October 1st, DOE
11 certifies and then on November 1st, they certify.
12 Are we saying that they don't have to worry about
13 any document that was created in October? And that
14 their updates supplement certification just simply
15 says, "Oh, we're just giving you here on November
16 1st everything that was created up until October
17 1st?" Is that the rule we're proposing or
18 suggesting? I'm not sure whether I feel easy with
19 that.

20 MR. EGAN: Your Honor, I think that if
21 you do that, you get into sort of a Zeno's Paradox
22 where then you have to have another day to certify,
23 your interim date, and so forth. It seems to me
24 that the only reasonable way to do this is to assume
25 that when you certify, you're certifying that you've

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1 exerted best efforts to put forward all the
2 documents you have that qualify and we all
3 understand that there's going to be a tail as Mr.
4 Shibelski calls it where there are documents that
5 you didn't know about or didn't have time to put in
6 because they came in the midnight before or
7 whatever. And it would be unreasonable for another
8 party to challenge the non-inclusion of those on
9 those hyper-technical grounds.

10 So it seems to me that if we just apply
11 the good faith standard that's really in the regs on
12 certification that we don't have to have yet another
13 deadline attached to the certification and ad
14 infinitum.

15 CHAIRMAN MOORE: Recognizing as I
16 understood all of us that in your then first
17 supplementation after certification which must be
18 done monthly you will have picked up what Mr.
19 Shibelski calls the tail.

20 MR. EGAN: Right.

21 CHAIRMAN MOORE: And the same tail is
22 always present in every monthly supplementation and
23 it's picked up in the next monthly supplementation.

24 MR. EGAN: But my point, Your Honor, is
25 that I think it would be unwise to put a time frame

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1 on the tail. I think the tail really relates to
2 good faith and rule of reason more so than it
3 relates to a specific number of days.

4 JUDGE KARLIN: My concern is that we're
5 not creating some automatic 30-day tail, but maybe,
6 Mr. Shibelski, what were you saying? Are you
7 suggesting an automatic 30-day tail or good faith?

8 MR. SHIBELSKI: Good faith on updating
9 or actually under the orders we put that we do
10 updates every seven days as we produce privilege log
11 entries and redaction.

12 JUDGE KARLIN: No, under the order, you
13 don't do updates every seven days. You do updates
14 every 30 days. Duty to supplement is every 30 days.

15 MR. SHIBELSKI: Duty to supplement.

16 JUDGE KARLIN: And that duty to
17 supplement comes from our order. There is no
18 regulation that says duty of supplement is every 30
19 days. It just says there is a duty to supplement,
20 2.1003(e), that new provision that came in and we
21 just said let's do it every month.

22 MR. SHIBELSKI: The point I wanted to
23 address, Judge Karlin, is one you mentioned and
24 maybe we don't want to get in it here. Maybe it's a
25 topic for another conference later on. But as part

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1 of the rule of reason that Mr. Egan so correctly
2 espouses here, you have to keep in mind, if you
3 think about it, DOE's monthly document generation
4 exceeds the entire collection of every other party
5 other than the NRC staff. So we are in a vastly
6 different situation in terms of just the number of
7 documents, the number of people, the number of
8 organizations.

9 So whereas it might be in context more
10 reasonable to say someone, an entity who currently
11 has 12 documents in their collection when they
12 certify, yes, they ought to be able to say they have
13 all their documents up to a very close date of their
14 certification. But for DOE, what's reasonable, and
15 we can lay out why this is reasonable, you have to
16 have a greater tolerance.

17 JUDGE KARLIN: I think that's right. I
18 think I understand that. Yes.

19 CHAIRMAN MOORE: Okay. But there's
20 general agreement that then at the time of
21 certification for both privilege logs and redacted
22 documents everyone will produce them at the time of
23 certification within reason recognizing there's this
24 tail and then that each time there's a monthly
25 supplementation, there will be additional privilege

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1 logs and redacted documents produced that will be
2 covering the tail and as we said in our initial
3 decision, striking the first certification of DOE,
4 that everyone agreed that there was a good faith
5 standard that applied in what documents had to go
6 into the system and that's the same standard we're
7 essentially applying here.

8 The clerk will open the telephone lines.

9 MS. CURRAN: I wanted to make a comment,
10 Judge Moore.

11 CHAIRMAN MOORE: Yes, Ms. Curran.

12 MS. CURRAN: It seems to me that the 30-
13 day requirement with the good faith standard is
14 appropriate. But one important consideration here
15 is what do you do during the last 30-day period?
16 You're going to get to the end and then what's
17 important --

18 CHAIRMAN MOORE: Ms. Curran, you are so
19 optimistic.

20 MS. CURRAN: And I'm thinking of
21 geologic time here.

22 CHAIRMAN MOORE: I think for today we
23 will just share your optimism and yet not have to
24 reap when that day will be.

25 (Laughter.)

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1 CHAIRMAN MOORE: If the clerk will open
2 the line. Are there any comments from the telephone
3 participants on treating the redactions differently
4 from treating privilege logs?

5 MS. TREICHEL: This is Judy Treichel and
6 during this whole discussion, it occurred to me that
7 as far as public interest groups are concerned we
8 are more concerned over what gets redacted and what
9 is privileged than actually the timing and I think
10 for this meeting we are more concerned with timing
11 issues.

12 CHAIRMAN MOORE: Thank you. Any other
13 comments from telephone participants?

14 MS. PITCHFORD: Yes. This is Loreen
15 Pitchford. I have a question about the supplemental
16 and it refers to the fact that we have not been
17 supplementing for several months. So when the time
18 comes to supplement and, in other words, re-certify
19 with the supplemental and we have been already
20 adding documents, maybe additional documents, do we
21 list those documents? Are they are part of the new
22 supplemental that we begin or are they not
23 considered in the monthly 30-day? I hope I'm making
24 sense here.

25 JUDGE KARLIN: This is Judge Karlin. I

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1 think one point. We did issue an order at one point
2 a year ago, I think, suspending the duty to
3 supplement for the time being. So right now, for
4 those parties or potential participants who have
5 certified you have a duty to supplement every month.
6 But we suspended that duty to supplement given the
7 long, apparent delay associated with DOE's
8 certification. So you're okay for now, I guess, my
9 answer is.

10 CHAIRMAN MOORE: The clerk will mute the
11 line. Let's now turn to that very issue when we
12 should be lifting the suspension of the duty to
13 supplement. Staff, since you moved to have the
14 suspension put in place, what's your view of when we
15 should lift the suspension?

16 MS. ZOBLER: Your Honor, we believe the
17 suspension should be lifted when DOE actually comes
18 in and certifies. That would be the initiating
19 event.

20 CHAIRMAN MOORE: And at that point,
21 those parties such as the staff that have already
22 certified will pick up from when the suspension went
23 into effect until that point in time.

24 MS. ZOBLER: That's correct.

25 CHAIRMAN MOORE: You'll catch it all

1 then in the then next supplementation.

2 MS. ZOBLER: That's correct, Your Honor.

3 CHAIRMAN MOORE: Does that seem
4 imminently reasonable in the meantime? Do you have
5 any comment?

6 MS. CURRAN: I just have a question.

7 CHAIRMAN MOORE: Ms. Curran.

8 MS. CURRAN: I don't understand. Do you
9 mean after DOE certifies, 30 days after that? Is
10 that what you're saying?

11 MS. ZOBLER: That's correct. All the
12 parties that had already certified would have to
13 then begin supplementing, I suppose, 30 days after
14 DOE certifying.

15 CHAIRMAN MOORE: So if I understood you
16 correctly, you're suggesting that the Board should
17 lift the suspension order at the time DOE certifies
18 its collection and then it would come into play for
19 the next monthly certification.

20 MS. ZOBLER: That's correct.

21 JUDGE KARLIN: I have one question about
22 that or a thought. Once DOE certifies, the staff
23 obviously has to certify 30 days later. You've
24 already certified. So the suspension would be
25 lifted and you'd have to supplement 30 days later.

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1 MS. ZOBLER: Supplement.

2 JUDGE KARLIN: This would be no
3 different for you. For others who have certified
4 and are now in the suspended situation, you're
5 suggesting they wouldn't need to supplement 30 days
6 later?

7 MS. ZOBLER: That's correct, Your Honor,
8 for those parties or potential parties who have
9 certified.

10 JUDGE KARLIN: Who have certified.

11 MS. ZOBLER: Yes.

12 JUDGE KARLIN: And those who had not
13 certified would be filing their initial
14 certification 90 days later.

15 MS. ZOBLER: That's correct. That would
16 be consistent.

17 JUDGE KARLIN: That's right. I wonder
18 if we might amend that to specify that for those
19 other parties whose duty to supplement would be the
20 same 90 days as their colleagues who hadn't
21 certified already. Anyway, it's something we, I
22 think, ought to consider, but what we end up with is
23 some people have certified perhaps inadvertently
24 early and I'm not sure whether we want to play
25 "Gotcha" with them or give them the full 90 days

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1 that their colleagues who hadn't certified would be
2 getting anyway.

3 (Off the record comments.)

4 JUDGE KARLIN: I am saying what you're
5 proposing would create a dichotomy for some of the
6 environmental groups and other entities. Those who
7 have certified would have to supplement 30 days
8 after DOE submits; whereas, the others who haven't
9 certified would have 90 days.

10 MS. ZOBLER: I understand that problem.

11 JUDGE KARLIN: Okay. We'll just think
12 about that.

13 CHAIRMAN MOORE: If the clerk will open
14 the telephone lines. Do the participants by
15 telephone have any comment on this?

16 MS. TREICHEL: No, I have no comment on
17 that. Judy Treichel.

18 CHAIRMAN MOORE: Hearing none, the clerk
19 will close the line. We'll move on to the next
20 issue. As noted in our February 9th order, we have
21 before us the proposed joint third case management
22 order dealing with sensitive, protected information.
23 As also noted in that order, there are several
24 Commission activities involving that subject matter.
25 There's a propose rule dealing with safeguards

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1 information and there may be some other staff
2 activities and Commission rulemaking activities on
3 how to deal with protected information.

4 The staff was put on notice that we
5 would be expecting a report on the timing and
6 current status of those and then we'll move to how
7 they may or may not impact the proposed third case
8 management order.

9 MS. ZOBLER: Yes, Your Honor. With
10 respect to the proposed revisions to Part 73 as you
11 noted, the comment period expired on January 2nd and
12 the staff is now in the process of reviewing those
13 comments. The goal is to have a final rule for
14 Commission affirmation by not later than December
15 2007 of this year.

16 With respect to other agency actions,
17 there are no known agency activities that would
18 affect this high level waste proceeding.

19 CHAIRMAN MOORE: Can the staff tell us
20 from staff perspective only are there likely to be
21 any significant changes between the proposed rule
22 and the final rule?

23 MS. ZOBLER: Your Honor, I can't say at
24 this time.

25 CHAIRMAN MOORE: Are there any other

1 rulemaking activities that will impact the area of
2 sensitive, protected information?

3 MS. ZOBLER: There are no activities
4 that would affect the high level waste proceeding.
5 You noted other activities in your order, Your
6 Honor, but they wouldn't affect this proceeding.

7 CHAIRMAN MOORE: I'm sorry. I don't
8 think I understood that. There are no other staff
9 or Commission rulemaking activities that will impact
10 our dealing with sensitive, protected information.

11 MS. ZOBLER: That's correct, Your Honor.

12 JUDGE KARLIN: Can I ask this? Let's
13 say there's a rulemaking out there that may be
14 dealing with this subject matter but has a provision
15 that says "But this doesn't apply to the PAPO
16 proceeding," a little exclusion. Are you suggesting
17 that if such a rule were issued the staff would
18 never cite to us this other rule by analogy to be
19 considered?

20 I mean I understand there can be a
21 technical exception for PAPO proceedings which
22 technically you may be correct in saying, "Oh,
23 there's nothing that specifically applies." But are
24 we going to hear someday there is this rule out
25 there that you should consider even though

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1 technically it doesn't apply?

2 MS. ZOBLER: Your Honor, I can't predict
3 future activities. I can say as of this date there
4 are none.

5 JUDGE KARLIN: Okay.

6 CHAIRMAN MOORE: Staff, can you then
7 tell us from the proposed rule which is usually a
8 pretty good benchmark of where the final rule is
9 going to come out and you line up the proposed rule
10 and the proposed third case management order, are
11 there any conflicts that you can identify for us
12 between that proposed rule and the proposed third
13 case management order?

14 MS. ZOBLER: Yes, Your Honor. The
15 biggest difference you'll see between the two is the
16 proposed rule would impose a requirement for a
17 criminal background check in addition to the general
18 background check and the proposed order provides for
19 one or the other in order to gain access to
20 safeguards information. So that would be the major
21 difference between the proposed order and the
22 proposed rule.

23 JUDGE ROSENTHAL: And the proposed rule
24 requires both.

25 MS. ZOBLER: Yes.

1 CHAIRMAN MOORE: And then the only way
2 to avoid tripping that wire would be to impose the
3 greater. Is that correct?

4 MS. ZOBLER: That's correct.

5 CHAIRMAN MOORE: In the case management
6 order in our dealing with this?

7 MS. ZOBLER: To be consistent with the
8 proposed rule, that would be correct.

9 JUDGE KARLIN: Are you suggesting that
10 if we issue the third case management order as you
11 all have proposed it and then this proposed rule is
12 finalized as it is currently proposed that then
13 there would be a conflict and what would be the
14 result? Which would govern this proceeding?

15 MS. ZOBLER: The proposed order as we
16 submitted to Your Honor does have a provision where
17 in the event that there is a final rulemaking on
18 this issue that one of the parties could file a
19 motion to revise the proposed order in which case
20 that would be one avenue certainly the staff would
21 feel obligated to take. The other option is for the
22 --

23 JUDGE KARLIN: Let's say you filed a
24 proposed motion to amend the third case management
25 order to be consistent with the new reg that came

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1 out. Would that be required? Would you argue that
2 legally it's mandatory for us to do that or just
3 simply it's something we ought to think about?

4 MS. ZOBLER: We would argue it's
5 required once the rule becomes final.

6 JUDGE ROSENTHAL: Why would there be any
7 question about that? If there's a regulation in
8 place and the regulation applies clearly to this
9 proceeding, I would think that the regulation would
10 automatically supersede any inconsistent provision
11 in our case management order, would it not?

12 MS. ZOBLER: I agree with you, Judge
13 Rosenthal. It would automatically --

14 JUDGE ROSENTHAL: You probably even need
15 the -- I would suppose that to operate in a clean
16 fashion a motion calling attention to the new
17 regulation and its impact upon the case management
18 order would be a good thing. But it would seem to
19 me that this Board would be required to take
20 official notice of the regulation and to give it
21 effect irrespective of what might have been stated
22 in the case management order.

23 MS. ZOBLER: I agree. I do believe for
24 purposes of just clarification and to avoid
25 confusion because of the large number of

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1 participants it would be useful to actually amend
2 the order.

3 JUDGE KARLIN: Did anyone submit
4 comments to the proposed regulation urging that this
5 proceeding given that a carefully thought-out case
6 management order had been developed should be
7 excluded from the ambit of the proposed rule?

8 MS. ZOBLER: I'm not aware of comments
9 to that effect.

10 JUDGE KARLIN: Could the Commission do
11 that if it chose, exclude the proceeding from the
12 ambit of that regulation?

13 MS. ZOBLER: Yes, the Commission could.

14 JUDGE KARLIN: Okay. But otherwise
15 whatever is in the third case management order the
16 Commission can unilaterally simply vitiate by
17 issuing a regulation that would change the rules.

18 CHAIRMAN MOORE: No, they could vitiate
19 (Inaudible.) in the order. Are there any other
20 conflicts? That one was the major one. It's always
21 the minor ones that come back to get you.

22 MS. ZOBLER: There are some small
23 differences in terms of the actual protection and
24 storage of this safeguards information once it has
25 been provided to a participant which may require

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1 some minor changes. One that comes to mind is the
2 proposed rule had a requirement that the facility
3 where the safeguards information will be stored in a
4 safe or a locking cabinet is not allowed to actually
5 indicate it has safeguards information and our
6 proposed rule is silent on that. So we would have
7 to clarify those kinds differences. The order
8 would.

9 JUDGE KARLIN: I guess on the third case
10 management order and we went over this at some
11 length in October of 2005 I was always troubled by
12 the fact that NRC has safeguards information and DOE
13 has UCNI and the Navy has Naval Nuclear Propulsion
14 information and there is a dramatic difference
15 between the amount of protection that the NRC seems
16 to assert in terms of need-to-know, criminal
17 background, etc. compared to these other agencies
18 that have other highly secretive and important
19 information as well. Why is there such a huge
20 dichotomy and additional burden posed by NRC when
21 these other agencies have equally sensitive
22 information and don't seem to impose that?

23 MS. ZOBLER: Your Honor, with respect to
24 the safeguards information, the Commission has made
25 a determination that this information is of such

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1 significance that it requires additional protection.
2 I can't --

3 JUDGE KARLIN: I understand Chairman
4 Klein when he arrived here made a few remarks, one
5 of which was he came from the Department of Defense
6 where they deal with extraordinarily sensitive
7 information and he was a bit surprised at how NRC
8 couldn't even access the NRC files. So just a
9 thought: I mean they are used to sensitive
10 information and yet they don't have these
11 requirements.

12 CHAIRMAN MOORE: Does DOE have any
13 comments on this since you have a handful of
14 safeguards documents and will not the NRC final rule
15 apply to those as well or will there be a different
16 set of rules over DOE for dealing with DOE safeguard
17 documents?

18 MR. SHIBELSKI: It's my understanding
19 that and view that the same rules would apply to DOE
20 safeguards documents. I believe DOE's general view
21 is that the third case management order whether now
22 or in the future would need to track whatever
23 requirements that the Commission adopts in its
24 regulations.

25 A second observation, two additional

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1 observations, is that just to make it so we're all
2 clear that the definition of safeguards information
3 is not changing in these regulations or doesn't
4 affect what we are doing on our side of identifying
5 safeguards information and redacting them. It does
6 affect, however, potential parties or other people's
7 access to documents and so something to think about
8 is if we certify in the beginning of our window
9 October 1st and we have the current case management
10 order in place to deal with safeguards information
11 and then in December, it's not until December that
12 the Commission comes out with its new regulations
13 and mandates the criminal background check, what do
14 we do about the people who have had access or
15 applied for access in the interim?

16 Maybe we need to take a wait-and-see
17 attitude because it won't affect our ability to
18 certify because we can process what we're doing with
19 the regulations in limbo. But somewhere down the
20 road if the --

21 CHAIRMAN MOORE: Let me ask in regard to
22 that, Mr. Shibelski. Assume that you certify on
23 October 1 and October 20th under the proposed case
24 management order or something similar to that is in
25 effect and a potential party requests the

1 information and it's redacted so that they can see
2 the redacted and then they want to go further and
3 obtain it under a protective order and they are
4 successful. Then a final rule comes out and the
5 rules of the game are changed. Does the safeguard
6 information in the possession of the person who got
7 it all properly have to be disgorged?

8 MR. SHIBELSKI: It may well. That's why
9 I raised the question and it may be prudent if
10 that's the way the timing of things work out that if
11 we're in that sort of interim period maybe people
12 requesting safeguards information would want to
13 voluntarily submit to the criminal background check
14 so they don't have to be whip-sawed that the
15 regulations changed.

16 JUDGE KARLIN: I think that's probably a
17 nugget of a good idea. There is a six-month period
18 created by the regulations for this pre-license
19 application discovery process. That's a pretty
20 short period. If people who are interested in this
21 material are going to wait until after DOE certifies
22 to even begin to go through the process of getting
23 the background checks and the other things that you
24 all propose to have and may be needed in the third
25 case management order, if you wait until October 1st

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1 or 2nd to start that process, you are in trouble
2 already because you have six months and two or three
3 of those months just went by before you can even get
4 a look at those documents.

5 So there may be people who might want to
6 start that process beforehand, before October 1st or
7 December 21st, and that just exacerbates the problem
8 you just pointed out, Mr. Shibelski, which is if
9 they begin that process and make clearance under
10 that process let's say in July of '07, so they're
11 ready to go whenever you certify and the rules
12 change thereafter, we're going to have to deal with
13 that. But I just think we have to deal with that.
14 If the rules change, they may not change, we do not
15 know. But I think if we come up with a procedure
16 that's agreed upon or that works so we can issue an
17 order for access if people go through certain
18 clearances, I would encourage people to start
19 getting their act together on that earlier rather
20 than later if they want to enjoy the full six
21 months.

22 JUDGE ROSENTHAL: As a matter of idle
23 curiosity, what's involved in a criminal background
24 check, particularly in terms of the time that is
25 likely to be required once the request is put into

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1 effect? Does anybody have any idea in the fee? I
2 mean, are we talking about once?

3 MS. ZOBLER: I don't know how long it
4 would take. It would involve an FBI fingerprint
5 check and I could find out from one of our security
6 experts here.

7 JUDGE ROSENTHAL: That's going to have
8 some practical impact obviously on assuming that the
9 Commission adopts a regulation which requires that
10 kind of a background check as a condition precedent
11 to obtaining access to materials.

12 MS. ZOBLER: We could look into that and
13 get back to you on that.

14 CHAIRMAN MOORE: The staff, in October,
15 of 2005 when we were exploring how to deal with
16 protected sensitive information in previous case
17 management conference took a different position than
18 DOE on redacting safeguards information. DOE took
19 the position that it could be done reasonably and it
20 didn't give them heartburn. The staff took the
21 position that the world will end and all we could
22 gather from that was that the staff -- Well, the
23 staff's stated reason was that it created one more
24 opportunity for error indicating at least to us and
25 I think we expressed it at that point that the staff

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1 obviously didn't have any faith in its own staff
2 that would be doing the redaction.

3 Be that as it may, is that still the
4 staff's position today that they do not see the
5 wisdom in redacting safeguard documents and putting
6 them in redacted form in the LSN?

7 MS. ZOBLER: I'm not aware of a change
8 in the staff's position. I think the concern was
9 because it was safeguards information that there is
10 always the potential of mistakenly allowing it -- of
11 missing something. That coupled with the ability of
12 participants to actually get at the entire document
13 we felt provided the appropriate level of access and
14 protection.

15 CHAIRMAN MOORE: And refresh my
16 recollection. The proposed third case management
17 order doesn't deal with that dichotomy and position
18 between DOE and the NRC staff.

19 MS. ZOBLER: I don't believe it does,
20 sir.

21 JUDGE KARLIN: My recollection is that
22 it might. I think we all need to go back.

23 MS. ZOBLER: There is a discussion of
24 reacting of documents in there.

25 JUDGE KARLIN: I believe that there may

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1 still be. If I recollect it, it is that the staff
2 does not need to produce redacted versions, whereas
3 DOE will produce redacted versions. Anyway, we all
4 have to go back and study that. I might add that
5 the participants who were involved significantly in
6 the third case management order proposal were the
7 staff, DOE and the State of Nevada. Now staff and
8 DOE or as I characterize them are providers of
9 safeguards or UCNI information and the State is
10 going to be a receiver.

11 The State is in a kind of unique
12 position that they're relatively well-prepared
13 funded and they have statutory abilities to see this
14 information which are different from the rest of the
15 potential participants. So I would urge the other
16 potential participants or at that time I urge them
17 to take a look at this because the implications for
18 them is what needs to be thought out as much as
19 anything.

20 CHAIRMAN MOORE: Do any of the other
21 participants in the hearing room have any views on
22 the impact of the proposed rule, the Commission's
23 proposed rule, on dealing with safeguard information
24 as it relates to the proposed third case management
25 order?

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1 MR. MALSCH: Judge Moore, we have some
2 views on this. We heard what the staff said. I
3 think we don't necessarily disagreed, although I
4 think the implications of the one conflict they
5 pointed out were not so clear to us because in the
6 proposed rule, both requirement for a criminal
7 background check based upon submission of
8 fingerprints and the requirement for a separate
9 background determination, both contributing to a
10 trustworthiness and reliability determination were
11 subject to Commission exceptions. And if the
12 Commission granted exceptions to both of those, it
13 wasn't clear to us necessarily that the import
14 between exceptions was different than the import
15 from the proposed third case management order.

16 Now I might also point out that we
17 picked up a couple of other kind of interesting
18 things in the proposed Part 73 rulemaking in which
19 it didn't seem to us that the end result was any
20 different, but how you got there was a little bit
21 different. And let me just mention a few of them
22 for the Board just as a matter of interest.

23 On the trustworthiness and reliability
24 determination, the proposed case management order
25 had an exception for Nevada and other interested

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1 states that talked about that there was no such
2 requirement for those designated by the governor as
3 representatives of the state.

4 CHAIRMAN MOORE: Which is the current
5 regulatory exemption.

6 MR. MALSCH: Yes.

7 CHAIRMAN MOORE: Is that carried over in
8 the proposed rule?

9 MR. MALSCH: We had read the proposed
10 rule to possibly intend something different, but
11 it's not entirely clear. The proposed rule says
12 "designated state employee representatives." So it
13 wasn't clear to us whether a change was intended.
14 That is to say, whether the exemption applied to
15 designated representatives of the state or just a
16 limited class of designated representatives of the
17 state who are also state employees.

18 JUDGE ROSENTHAL: Are you bringing this
19 uncertainty to the attention of the Commission in
20 comments on the proposed rule?

21 MR. MALSCH: We have not only because as
22 I said, there are exceptions provided in the
23 proposed rule for those kinds of requirements. So
24 there's nothing necessarily inconsistent between the
25 proposed Part 73 and the third case management

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1 order. It was just curious that the staff being
2 aware of the proposed third case management order
3 didn't use the precise, same language. I think the
4 net effect is approximately the same, but it's kind
5 of interesting.

6 CHAIRMAN MOORE: Are there any other
7 difficulties that you see arising?

8 MR. MALSCH: I would say "difficulties."
9 I just think the path to get approval is a little
10 different. On need-to-know determinations, I would
11 read the proposed rule as resolving one of the
12 issues we had reserved or the staff really had
13 reserved which is whether as I recall if there could
14 be such a thing as need-to-know or whether need-to-
15 know would operate differently in the pre-license
16 application phase. As I read the proposed rule,
17 there's no distinction drawn between need-to-know in
18 the pre-application phase and need-to-know in the
19 post-application phase. So I had read the proposed
20 rule as possibly resolving that issue.

21 CHAIRMAN MOORE: Now the proposed rule,
22 I believe, if memory serves that the exemption for
23 given to the governor and the state employees or
24 contractors avoids the need-to-know for obtaining
25 safeguards, does it not, in other words, if the

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1 State of Nevada will be able to obtain this
2 information without a showing of need-to-know.

3 MR. MALSCH: I think that issue was
4 reserved in the case management order for the pre-
5 application phase. Maybe I'm wrong about that. I
6 was looking at the cover letter.

7 MS. ZOBLER: The way I understood it was
8 the need-to-know, if one of the aspects of need-to-
9 know is is it necessary to formulate a contention,
10 would still need to be demonstrate even by
11 representatives of Nevada. Once that has been
12 demonstrated, they would not have to undergo the
13 criminal history check.

14 CHAIRMAN MOORE: Okay Now -- but the
15 dichotomy between, as I understood it, Nevada's
16 position and the staff's position was that counsel
17 would not be entitled to see anything unless counsel
18 could guess what was in that information that they
19 can't see called safeguards and hire the expert that
20 they would need to demonstrate expertise to
21 understand even though they don't know what expert
22 they're going to need. That left us a little cold
23 on how counsel without seeing it is supposed to pick
24 the right expert. Why did the State of Nevada drop
25 your objections to that and sign on to it?

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1 MR. MALSCH: There was a provision in
2 the order that we thought took care of which said
3 that if there were appropriate technically-qualified
4 people available, counsel would also be deemed
5 qualified. There was no separate requirement for
6 counsel to be technically qualified.

7 CHAIRMAN MOORE: But the way the rule
8 reads, the proposed rule reads, counsel doesn't
9 qualify unless the counsel is technically qualified.

10 MR. MALSCH: We hadn't read the rule
11 that way. The proposed rule says you must be
12 qualified to utilize the information. We read that
13 broadly to say that if you had experts who were
14 qualified to utilize the information then in their
15 own way, counsel and assistants would also be
16 utilizing the information necessarily albeit it --

17 CHAIRMAN MOORE: That was the staff who
18 took the position. But I was troubled by how even
19 the State of Nevada, but certainly another party
20 without the governor's exemption, they are to now
21 what expert to have before you see the information.
22 Generally, the job of counsel is to make the
23 determination of what kind of experts they need
24 depending on after seeing the information that
25 counsel is not kept in the dark. The staff's

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1 position and as I understood the proposed rule's
2 position is that counsel is no different from
3 anybody else. They're to be kept in the dark. Is
4 that correct, staff?

5 MS. ZOBLER: The proposed rule doesn't
6 speak directly to that. I agree. The proposed
7 order does have the provision that Mr. Malsch
8 mentioned which is that if the attorney has
9 technical help who is competent, then they also have
10 access to that information and the staff's view is
11 that would be appropriate.

12 CHAIRMAN MOORE: How do you deal with
13 the chicken-and-egg problem?

14 MS. ZOBLER: We would assert that there
15 would be enough information already publicly
16 available so that the counsel could evaluate the
17 public information and then determine whether they
18 need to obtain technical expertise and then
19 demonstrate the requisite need-to-know.

20 MR. MALSCH: I think on the state's
21 behalf, we have a group of experts that fairly spans
22 most of the areas (Inaudible) by the application.

23 JUDGE KARLIN: If I might say, the state
24 doesn't have any problem.

25 MR. MALSCH: No.

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1 JUDGE KARLIN: The state has lots of
2 experts. Who has a problem is everybody else.

3 MR. MALSCH: Right.

4 JUDGE KARLIN: They are going to have to
5 hire somebody before they can even get the documents
6 to decide whether they're relevant. So I think the
7 state is not a very good representative for purposes
8 of this problem. I mean you're articulating your
9 client's concerns and needs and that's fine. But
10 this has an impact on everyone else which you, the
11 state, is in an unique position and not very
12 representative of.

13 MR. MALSCH: I agree. I was going to
14 make that point that I think we're happy with the
15 way it's drafted. But I can see where other
16 participants might have a possible problem.

17 JUDGE KARLIN: Okay.

18 JUDGE ROSENTHAL: If you're making
19 assumptions as to what the proposed rule provides,
20 assumptions that might not be shared by others, I
21 would think you would want to comment on this rule
22 to make it clear that you're interpreting it in a
23 particular fashion and if that interpretation is not
24 what's in the minds of the formulators of the
25 propose rule that you would want them to have your

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1 view that your interpretation should carry the day
2 be known.

3 MR. MALSCH: I agree with that, although
4 I don't think we're hearing anything different from
5 the staff really in terms of the overall effect on
6 the third case management order.

7 CHAIRMAN MOORE: Ms. Curran, you had a
8 comment.

9 MS. CURRAN: No, I didn't.

10 CHAIRMAN MOORE: Do the parties have any
11 suggestions for us on how they think we should best
12 proceed with this area of protective, sensitive
13 information?

14 MS. ZOBLER: Your Honor, I would suggest
15 that the case management order for now be modified
16 to reflect the proposed rule keeping in mind that
17 there might be subject to some changes once the rule
18 becomes final and that would avoid the problem that
19 Mr. Shibelski raised about the shifting of the
20 requirement.

21 CHAIRMAN MOORE: How would -- If we go
22 ahead with the third case management order it's
23 going to have to be changed to comply with the
24 staff's, I'm sorry, the Commission's final rule
25 which is now not scheduled until December 2007. We

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1 can't wait for the rule to come out before dealing
2 with the problem because DOE is going to certify in
3 all probability in advance of that. So the desire
4 would be not to waste valuable time having to do
5 things more than once. But we may just be stuck
6 with that inefficiency here.

7 MS. ZOBLER: I believe that's the more
8 conservative approach given the time that a criminal
9 background check may or may not take and that would
10 then avoid problems later on once the rule becomes
11 final.

12 JUDGE ROSENTHAL: You mean we should
13 assume at this point for the purposes of the next
14 case management order that the Commission will adopt
15 the proposed rule as it now stands?

16 MS. ZOBLER: That's the most
17 conservative approach, I believe, Your Honor. Yes.

18 JUDGE ROSENTHAL: Mr. Shibelski, what do
19 you think of that?

20 MR. SHIBELSKI: I think that makes
21 sense. I think it would be helpful for the process
22 as a whole if we had some order in place now so
23 participants can know the rules of the game and to
24 adopt the approach that assumes the current draft
25 regulations would be adopted would be sensible.

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1 JUDGE KARLIN: But doesn't that make
2 somewhat of a sham of the public comment period? I
3 would assume that public comments are beginning to
4 be taken seriously and may result in changes to the
5 final regulation. So I do not approach the proposed
6 rule with some sort of that that's the gospel that
7 will necessarily be the final rule. In fact, I
8 suspect that it will be changed. That's what the
9 public process is about.

10 MR. MALSCH: I'm sorry. I was under the
11 apprehension from counsel that no one had commented
12 on the criminal background check.

13 MS. ZOBLER: I wasn't aware of any. I
14 don't know for sure.

15 JUDGE KARLIN: Fine.

16 MS. ZOBLER: Again, my suggestion was
17 that it was the most conservative approach.

18 JUDGE KARLIN: Yes, I agree.

19 JUDGE ROSENTHAL: Mr. Malsch, what do
20 you think?

21 MR. MALSCH: I think -- This is kind of
22 a difficulty here because I wasn't aware the
23 schedule was so protracted because I think there is
24 a need to have a third case management order before
25 December of 2007. Yes, we won't know what the rule

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1 is until sometime after that.

2 I guess if we have to have a third case
3 management order before that time and I think we do
4 I don't know what else we have to go on besides the
5 proposed rulemaking. I suppose one possibility
6 would be for the Board to approve a third case
7 management order and then refer to the Commission
8 the order with the observation that it is now in
9 effect and if the Commission were to make any
10 substantial changes in the final rule as a result of
11 public comment they should be aware of the possible
12 disruptive effect on the Yucca Mountain proceeding
13 unless they intend to grandfather the case
14 management order in the rule.

15 JUDGE ROSENTHAL: And has the comment
16 period ended?

17 MS. ZOBLER: Yes, Your Honor. January
18 2nd.

19 JUDGE ROSENTHAL: So we have some,
20 therefore, idea as to the extent to which there is
21 public opposition to one or another of the
22 provisions of the propose order, do we not?

23 MS. ZOBLER: Yes, Your Honor, and I
24 don't have that information with me today. I could
25 go back and check with our rulemaking staff and see

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1 if I can get a sense of the comments.

2 JUDGE ROSENTHAL: I would be interested
3 and I think my colleagues would as well to just what
4 opposition has been expressed to particular
5 provisions because that may provide some insight as
6 to the likelihood that the Commission would make the
7 alterations that Judge Karlin has postulated.

8 MS. ZOBLER: I could provide that.

9 CHAIRMAN MOORE: Ms. Zabler, could you
10 refresh my recollection? December of 2007 for the
11 final action on this rule has been delayed
12 approximately a full year from what was originally
13 announced when we started this process.

14 MS. ZOBLER: I believe that's correct,
15 Your Honor.

16 CHAIRMAN MOORE: We were supposed to see
17 the rule in 2006, were we not?

18 MS. ZOBLER: I recall reading in one of
19 the transcripts about that was discussed.

20 MR. EGAN: Your Honor, aren't we really
21 saying that, as Mr. Malsch said, we see nothing in
22 the proposed rule that affects our previous
23 interpretation of how this would operate and since
24 the staff and Nevada agree on how it works, we don't
25 have to try to interpret the proposed rule other

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1 than to say we see no conflict and that way you can
2 go ahead with the third case management order and if
3 the final rule does change, then we can deal with it
4 then.

5 MS. ZOBLER: To clarify, the proposed
6 order provides an either/or, either a background
7 check or a criminal history check. The proposed
8 rule would require both. So there is a conflict.

9 MR. EGAN: But the effect of the
10 conflict that Mr. Malsch was talking about really
11 affects the issue of interpretation of whether that
12 goes to state employees. So we wouldn't --

13 JUDGE KARLIN: With respect to the
14 state.

15 MR. EGAN: Yes and their participants.

16 MS. ZOBLER: Right. That really seems
17 to be more the issue.

18 JUDGE KARLIN: As I understand it,
19 there's no guarantee that December of '07 the
20 proposed rule will go final. It could be six months
21 later. It could be a month earlier. It could be a
22 year later. We need to proceed in any event and we
23 need to proceed in compliance with the law as it's
24 in effect now and I don't really think we need to
25 copy the proposed rule on some basis that it's going

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1 to be finalized in December of '07 because I'm not
2 just that optimistic and people may have access and
3 if they get their access and then later the rules
4 are tightened, they'll have to follow some
5 additional procedures later. I don't think that's
6 the end of the world. So long as they comply with
7 the requirements that are in effect at the time that
8 they have access, I think we've met the law and the
9 regs and we're proceeding properly especially in a
10 proceeding where we only have six months.

11 CHAIRMAN MOORE: The clerk will open the
12 telephone line. Do the telephone participants have
13 any comments on the proposed Commission rulemaking
14 regarding safeguards information and its impacts on
15 the proposed third case management order dealing
16 with protected information?

17 MS. TREICHEL: This is Judy Treichel
18 and, first off, it's very hard to hear on one end of
19 the table. I think where the Board is and where Mr.
20 Shibelski is we can make out when you say telephone.

21 The comment I would have is that like
22 privilege anything that's considered sensitive our
23 concern is more sensitive and how come it is and we
24 have even heightened chicken-and-egg situation in
25 that we have no funding. So we have to pick our

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1 battles very carefully and we have to hope that
2 we're able to see things and they aren't privileged.
3 I guess an example would be when a total system
4 performance assessment comes out from the Department
5 of Energy it's only accessible through (Inaudible)
6 that's proprietary plus it's a whole lot of meat to
7 have access to. So there are things that I guess we
8 would want to discuss what privileged and there may
9 be an opportunity to do that. I'm not getting the
10 sense that this meeting is.

11 JUDGE KARLIN: Ms. Treichel, this is
12 Alex Karlin again. You might want to take a look at
13 the proposed third case management order and the
14 proposed regulations that the NRC has put on the
15 table. Those may answer a lot of your questions
16 about those proposals think qualify for the
17 privileges and what you have to do to get them.

18 MS. TREICHEL: Okay. Thank you.

19 JUDGE KARLIN: Thank you.

20 CHAIRMAN MOORE: Any other comments?
21 The clerk will close the line. The Board will then
22 remove the third case management order from the
23 freezer and we'll see if we can't infuse it with
24 some life. If we have difficulties over the
25 immediate future with it, we may call upon you to

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1 answer some of our questions either in writing or
2 perhaps either this forum or perhaps a telephone
3 conference. But we will need to study it carefully
4 before we go. It's been 15 months and although
5 we've reviewed it for this, we will need to do some
6 serious study on it before we are willing to sign
7 off on it.

8 The State of Nevada was the only
9 participant that raised an additional issue pursuant
10 to the terms of our previous order that in the
11 Board's view seems to be now moot in light of the
12 announcement by DOE that they hope to make the non-
13 public part of their collection on the LSN publicly-
14 accessible within 60 days. State of Nevada, do you
15 wish to in light of that announcement pursue that
16 issue further?

17 MR. FITZPATRICK: I don't think we need
18 to. That's moot, Your Honor.

19 CHAIRMAN MOORE: That being the case --
20 Ms. Curran.

21 MS. CURRAN: Judge, while this may be a
22 moot point too, but if this conference is going to
23 go on much longer I would like to ask for a very
24 short break.

25 (Off the record comments.)

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1 CHAIRMAN MOORE: In the future, we will
2 strive when we hold case management conferences
3 either here or in Las Vegas in the hearing facility
4 there to open the other facility where we're not for
5 video conferencing so that participants can be in
6 either one or the other location. We will strive to
7 do that, but scheduling conflicts may preclude both
8 facilities being available simultaneously to us.

9 MS. CURRAN: Judge, I just want to say
10 thank you for that because that is very important to
11 my clients and they would appreciate your efforts to
12 do that.

13 CHAIRMAN MOORE: Which means because of
14 the time difference that we will have to hold third
15 case management conferences here later in the day so
16 that the good people of Nevada, although I know
17 they're early risers, I'm not sure they're that
18 early. They don't rise that early.

19 (Off the record comments.)

20 CHAIRMAN MOORE: That concludes this
21 case management conference. We thank you all for
22 your participation and we will take all these
23 matters under advisement and we will be issuing
24 amendments to the second case management conference
25 dealing with the matters we discussed today. Are

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1 there any other matters that any participant wishes
2 to raise?

3 MS. ZOBLER: Just one more point, Your
4 Honor. In the course of considering the third case
5 management order, you indicated you needed to go
6 back and look over it and may have more questions
7 for the participants, I'd like to raise also an
8 option that you could certify to the Commission this
9 question about the criminal history check in light
10 of the pending rulemaking as another option.

11 CHAIRMAN MOORE: The clerk will open the
12 telephone lines. Do the participants by telephone
13 have any additional matters, last minute matters,
14 they would like to bring to the Board's attention?

15 MS. TREICHEL: This is Judy Treichel.
16 Not at this time, but I thank you very much for
17 providing the telephone line.

18 MS. PITCHFORD: This is Loreen Pitchford
19 and I also wanted to thank you for making the effort
20 to have this available in this Las Vegas office for
21 the people who would like to participate and attend.
22 Thank you.

23 CHAIRMAN MOORE: The clerk will close
24 the lines. We stand adjourned. Thank you all. Off
25 the record.

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1 (Whereupon, at 11:17 a.m., the above-
2 entitled matter was concluded.)
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CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name of Proceeding: High-Level Waste Repository
Pre-Application Matters
Docket Number: PAPO-00
Location: Rockville, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Charles Morrison
Official Reporter
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